Supreme Court, U.S.
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In The
Supreme Court of the United States

JACK SUNSERI AND CONSOLIDATED PARTNERS LTD.,
Petitioners,

v.

PHYLLIS PROCTOR, CONRAD PROCTOR AND DAVID PROCTOR,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS R. WAELCHLI (P-40468)
Counsel of Record
LAW OFFICES OF THOMAS R. WAELCHLI
100 WEST BIG BEAVER ROAD
SUITE 385
TROY, MICHIGAN 48084
(248) 526-9595

Attorney for Petitioners

November 14, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Appellants are judgment creditors of a partnership and seek to hold the general partners liable for the judgment. The district court found the right to enforce the judgment against the partners accrued at the same time as the underlying claims asserted against the partnership. Appellants contend that the right to enforce the judgment accrued when the otherwise contingent liability of the partnership became fixed and chargeable to the partnership, i.e. upon entry of the judgment. The Sixth Circuit affirmed the district court's dismissal of the case upon statute of limitations grounds, adopting the Ninth Circuit's view, which is contrary to a decision of this Court and inconsistent with existing precedent and policy.

The questions presented are:

(1) Does the Sixth Circuit's holding that a judgment creditor's right to enforce a judgment against general partners does not accrue upon entry of the judgment but rather at the same time as the underlying claims asserted against the partnership in a prior action, conflict with holdings of this Court and other jurisdictions regarding the liability of general partners?

(2) Does the Sixth Circuit's holding that a judgment creditor's right to enforce the judgment against general partners does not accrue upon entry of the judgment but rather at the same time as the underlying claims asserted against the partnership in the prior action, deprive the creditor's judgment of the effect it would have had in the judgment

rendering state in violation of the Full Faith and Credit Clause of the U.S. Constitution?

LIST OF PARTIES/RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellants and Petitioners: Jack Sunseri and Consolidated Partners Ltd.

Defendant-Appellees and Respondents: Phyllis Proctor, Conrad Proctor and David Proctor.

CORPORATE DISCLOSURE STATEMENT

Jack Sunseri and Consolidated Partners, Ltd., make the following disclosure:

(1) Are any of the parties a subsidiary or affiliate of a publicly owned corporation? **No.**

(2) Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

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PETITION FOR A WRIT OF CERTIORARI

Jack Sunseri and Consolidated Partners Ltd. respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit dated August 18, 2008, is officially reported at 286 Fed. Appx. 930, 2008 WL 3837849 (C.A. 6(Mich)) and is reproduced at App. A, 1a-2a.

The Opinion and Order of the U.S. District Court for the Eastern District of Michigan, Southern Division, dated May 2, 2007, is officially reported at 487 F. Supp. 2d 905 (E.D. Mich 2007) and is reproduced at App. B, 3a-16a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on August 18, 2008. This petition is timely under 28 U.S.C. §210(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article IV, Section 1

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Title 28, United States Code, Section 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Title 26, Code of Federal Regulations, Section 1.461-1

Sec. 1.461-1 General rule for taxable year of deduction. . . . .

(ii) Uncertainty as to the amount of a liability. While no liability shall be taken into account before economic performance and all of the events that fix the liability have occurred, the fact that the exact amount of the liability cannot be determined does not prevent a taxpayer from taking into account that portion of the amount of the liability which can be computed with reasonable accuracy within the taxable year. For example, A renders services to B during the taxable year for which A charges $10,000. B admits a liability to A for $6,000 but contests the remainder. B may take into account only $6,000 as an expense for the taxable year in which the services were rendered. . . . . .

Florida Revised Uniform Partnership Act, F.S.A. 620.8306(1)

620.8306 Partner's liability.

(1) Except as otherwise provided in subsections (2) and (3), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by a claimant or provided by law.

Florida Revised Uniform Partnership Act, F.S.A. 620. 8307

620.8307 Actions by and against partnership and partners –

(1) A partnership may sue and be sued in the name of the partnership.

(2) An action may be brought against the partnership and, to the extent not inconsistent with s. 620.8306, any or all of the partners in the same action or in separate actions.

(3) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

(4) A judgment creditor of a partner may perfect a judgment lien but may not proceed against or otherwise levy or execute against the assets of the partner to satisfy a judgment arising from a partnership obligation or liability unless the partner is personally liable for the claim under s. 620.8306 and:

(a) A judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part. . .

Michigan Uniform Partnership Act,
MCL 449.15

449.15 Nature of partner's liability.

Sec. 15. (Nature of partner's liability). Except as otherwise provided by section 46, all partners are liable for both of the following:

(a) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

(b) Jointly for all other debts and obligations of the partnership. However, a partner may enter into a separate obligation to perform a partnership contract.

New York Parnership Law §26

S 26. Nature of partner's liability. (a) except as provided in subdivision (b) of this section, all partners are liable:

1. Jointly and severally for everything chargeable to the partnership under sections twenty-four and twenty-five.

2. Jointly for all other debts and obligation of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

STATEMENT OF THE CASE

This case arises out of a dispute between partners in a general partnership. Appellants, Jack Sunseri and Consolidated Partners, Ltd., (collectively "Sunseris") obtained a judgment in the amount of $5,984,686.01 ("Judgment") from the New York Superior Court against Macro Cellular Partners ("Macro"), a general partnership. Sunseris were general partners of Macro, as were one or more of the Appellees, Conrad Proctor, Phyllis Proctor and David Proctor (collectively "Proctors"). Sunseris brought the current suit seeking to collect the unsatisfied portion of the Judgment from the partners' personal assets.

Macro was formed in 1988 in California as a general partnership with the purpose of participating in Federal Communications Commission ("FCC") cellular phone lotteries. Participants in these lotteries sought licenses for cellular airspace in markets throughout the country.

In 1989, Macro won an FCC lottery and was awarded a license for the Ohio-4 RSA Cellular Market. Macro originally intended to develop this market, but later agreed to sell its license to Cellular Communications, Inc. ("CCI"), in 1991 for several installments of cash and stock totaling approximately $20 million.

In 1991, Macro moved its principal place of business from California to Florida, and subsequently resolved to be governed under Florida law, retroactive to September 1991. Beginning in 1992, a dispute arose between the Sunseris and the other partners in Macro involving the management of the partnership and various other partnership decisions. As part of this dispute, Macro resolved to withhold distributions to the Sunseris to off-set litigation costs the other partners attributed to the Sunseris. The bulk of the withholdings consisted of the proceeds of the agreement with CCI in 1991 which included stock and cash.

Later in 1996, Sunseris commenced suit in New York against Macro. Sunseris served the Proctors with a copy of the summons and complaint for the New York action, but did not name them as parties. Sunseris asserted that Macro had breached the partnership agreement, breached its fiduciary duties, and deprived Sunseris of their share of the Macro

profits. In May 1998, the New York court granted partial summary judgment to Sunseris on their claim of breach of the partnership agreement. The Court released $1.4 million to the Sunseris.

In 1999, Sunseris sought leave to amend their complaint in order to add additional claims and to join all of the Macro partners individually to the suit, including Appellees in the present case. The court denied Sunseris request to join the partners individually. The case then proceeded to trial and, finally, in 2005, after almost a decade of litigation and a three week Trial, the New York court entered a judgment against Macro in the amount of $5,984,686.01.

After establishing that Macro had no assets from which to satisfy this judgment. Appellants filed the instant case seeking to hold the Macro partners liable for this debt. This case was originally filed in state court but was removed to the Federal District Court on the basis of diversity jurisdiction.

The District Court below granted Proctors' Motion for Summary Judgment on statute of limitations grounds. The Court ruled that while partners are jointly and severally liable for the debts of their partnership and may be sued in a subsequent action to enforce a judgment previously rendered against the partnership, the second suit must be brought within the limitations period applicable to the underlying wrongs asserted against the partnership in the first case. That ruling was appealed to the Sixth Circuit Court of Appeals which affirmed the District Court's decision.

REASONS FOR ALLOWANCE OF THE WRIT

Whether a judgment creditor's right to enforce a judgment against the partners of the partnership accrues on the date of entry of the judgment or earlier, at the same time as the underlying claims which resulted in the judgment, is an important issue for each of the states that have adopted either the Uniform Partnership Act ("UPA") or the Revised Uniform Partnership Act ("RUPA"). The Sixth Circuit has adopted a rule that the creditor's right to enforce such a judgment accrues at the same time as the underlying claims asserted against the partnership. This rule conflicts with and is contrary to decisions of other jurisdictions and this Court, which instruct that if the statute of limitations is met as to the partnership, it is met as to the partners as well. The rule further conflicts with the now dominant "entity" theory of partnership which has replaced the older, "aggregate" theory.

This issue is of paramount importance at this particular time in history given the complex and difficult financial conditions impacting creditor and debtor rights. Considering the countless unwindings of financial relationships that are occurring, the issues presented in this case will almost certainly be raised again and again. Guidance from this Court as to the conflict between the Sixth Circuit and this Court and other jurisdictions needs to be addressed.

An additional reason for allowing the Writ is the Sixth Circuit's rule violates the Full Faith and Credit Clause of the United States Constitution by depriving the Judgment of the effect that it would have had in the judgment rendering state of New York.

I. REVIEW IS WARRANTED BECAUSE THE SIXTH CIRCUIT'S RULING IS CONTRARY TO THIS COURT'S DECISION IN *UNITED STATES v. GALLETTI* AND OTHER PRECENDENT AND POLICY.

Neither the Uniform Partnership Act (UPA) nor the Revised Uniform Partnership Act (RUPA) provide a specific statute of limitations for bringing claims against partners based upon a judgment against the partnership. The issue presented is whether a subsequent action against a general partner to enforce the judgment rendered against the partnership in a prior action must be brought within the limitations period applicable to the first action or whether the claim for enforcement against the partner accrues at the time of entry of the judgment.[1] The Sixth Circuit, relying on the Ninth Circuit rule, adopted the Proctors' position that the claim for enforcement of the judgment accrues at the same time as the underlying claim. Sunseris submit that the Sixth Circuit decision

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[1] Where a creditor obtains a judgment against a partnership, the creditor may thereafter file a second action against the partners to hold them jointly and severally liable for the judgment rendered in the first action. While due process requirements would not allow a judgment against the partnership to bind the assets of partners who were not parties to the prior litigation, the collateral effect of the prior judgment in a subsequent suit in which the partners are named and served satisfies due process requirements; *See Valley Nat'l Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332 (9th Cir. 1997); *14th RMA Partners*, 100 F.3d 278 (2nd Cir. 1996); *U.S. v. Sohn*, 971 F.Supp 488 (D. Or. 1997); *Dayco Corp. v. Fred T. Roberts & Co.*, 472 A.2d 780 (1984); *Brunsoman v. Seltz*, 414 N.W.2d 547 (Minn. 1988). The sole issue in the subsequent suit is whether the defendant is, in fact, a partner in the partnership. See *14th RMA Partners, supra* at 280.

was erroneous and contrary to an opinion of this Court.

A. Exiting Precedent Holds That The Statute Of Limitations Accrued Upon Entry Of The Judgment Against The Partnership And Not At The Same Time As The Underlying Claims Asserted Against The Partnership In The First Action.

In addressing this issue, various courts, including this Court, have found that partners are secondarily liable for debts of the partnership and once a judgment is entered against the partnership, the partners become liable for same.

(i) Sixth Circuit's Ruling Conflicts With The Precedent Of This Court.

In *United States v. Galletti,* 541 U.S. 114, 124 S.Ct. 1548 (2004), this Court rejected essentially the same arguments the Proctors have proffered in this case, i.e. while admitting that partners are jointly and severally liable for debts of the partnership, the *Galletti* partners asserted that the IRS's claims against them for collection of taxes must be brought within the limitations period applicable to claims against the partnership. This Court held that the partners were nevertheless liable for the partnership debt. The facts of *Galletti* are analogous to the present case and the holding is likewise applicable.

In *Galletti,* the respondents, general partners of a partnership, sought to defeat the IRS's claim against the partners for payment of the tax owed by the partnership.

The IRS had a specific time frame (three years) in which to collect the tax from the partnership taxpayer. The IRS could extend that time period to 10 years if it assessed the tax within the three year period. The IRS did, in fact, properly assess the tax within the three year period and when collection was not satisfied from partnership assets, the IRS sought to collect the tax from the general partners who had filed for Chapter 13 bankruptcy protection. The partners defended claiming that in order to be liable for the extended 10 year collection period, they too had to be assessed within the original three year limitations period, and since they were not, they were no longer liable for the debt. This Court rejected those arguments and found that since partners are secondarily liable for the debts of their partnership, if the IRS met the limitations period as to the partnership, it met it as to the partners as well:

> Under California law, a partnership maintains a separate identity from its general partners, and the *partners are only secondarily liable for the tax debts of the partnership as they are for any debt of the partnership.* Because, in this case, the only relevant "tax payer" for purposes of section 6501-6502 is the partnership, *we hold that the proper assessment of the tax against the partnership suffices to extend the statute of limitations for collection of the tax from the general partners who are liable for the payment of the partnership's debts.* (emphasis supplied). *Id* at 116.

This Court went on to say:

> Once a tax has been properly assessed, nothing in the Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for the payment of the taxpayer's debt. *Id* at 123.

Like the IRS, Sunseris met the limitations period in their claims against the partnership when they timely filed in New York Superior Court and ultimately obtained a judgment. Under state partnership law, the general partners of Macro, like the partners in *Galletti*, are jointly and severally liable for the debts of their partnership.[2] However, the Proctors have claimed, like the *Galletti* partners, that Sunseris needed to file against them within the same limitations period applicable to the underlying claims against the partnership. *Galletti* instructs that this assertion is erroneous. Because the partners are secondarily liable for the debts of the partnership, if the statute of limitations is met as the partnership, it is met as to the partners. Further, there is nothing in the various Uniform Partnership Acts that would require a creditor of a partnership to duplicate its efforts against the individuals or entities who are not the actual debtor, but are, by reason of state law, liable for payment of the debt.

The three year time limit for assessment in *Galletti* is the functional equivalent of a statute of limitations for bringing a cause of action. In essence, the IRS established its claim (assessment) against the

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[2] See e.g. New York Partnership Law §26, FLA Stat. 620.8307

partnership within the limitations period and the secondary liability of the partners followed without need for a second claim (assessment) to be made within the same three year time period. This is clearly analogous to the instant case where Sunseris timely pursued their claims and established the liability of the partnership upon entry of the Judgment in 2005. The secondary liability of the general partners should flow from that event on that date without requiring that the second action be filed within the time limit applicable to the first.

Sunseris further submit that the assessment itself in *Galletti* is the functional equivalent of the Judgment in the present case. This Court noted in *Galletti* that the function of the assessment is to calculate, establish and record the tax liability. *Id* at 122, 123. After the amount of liability is established by assessment, the IRS may employ various enforcement and collection methods. *Id.* Sunseris submit that a judgment operates in the same fashion. The judgment represents the establishment and recording of liability of the defendant. Upon entry of the judgment, the plaintiff, as the IRS after assessment, may employ various enforcement and collection remedies.

(ii) Sixth Circuit's Ruling Conflicts With Precedent Of Other Jurisdictions Which Establishes That The Secondary Liability Of The Partners Does Not Accrue Until Entry Of The Judgment.

There is extremely little case law on the precise issue raised in this case. Nevertheless, of the limited number of jurisdictions that have addressed it, several

have unequivocally held that the judgment creditor's right to collect against the partners accrues upon entry of the judgment without regard to the statute of limitations on the underlying claim.

The facts in *In Re: Jones*, 161 B.R. 180 (Bank.N.D. Tex. 1993) are similar to the procedural history of the instant case. A bankruptcy trustee obtained a judgment against a partnership and through a subsequent action sought a judgment against the partners. The Defendants in that case asserted that the action against them was barred by the statute of limitations applicable to the original claim against the partnership. At the time of the *Jones* decision, Texas operated under the Uniform Partnership Act which provided that all partners were liable jointly and severally for all debts and obligations of the partnership. *Id* at 182.

In addressing the statute of limitations argument, the Court found that the partnership did not owe a definite debt until the judgment against the partnership became final:[3]

> Thereafter, the Trustee sought to collect from the partnership and, failing full recovery, brought this action against the partners to collect the remainder of the judgment. *Limitations began to run against the partners*

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[3] Importantly, other Courts have also found that the liability of the partners was established upon entry of a judgment: "When the arbitration award was reduced to judgment, the joint obligation of the partners was conclusively established." *Dayco, supra* 472 A.2d at 504.

> *only when the district court's judgment became final. Id* at 183.

The *Jones* Court went on to state with regard to the entity theory of partnership law:

> *Under the entity theory of partnerships, it is logical that a partner has no liability until the partnership liability is established.* There is nothing wrong in allowing the partners to be sued along with the partnership so that once the partnership liability is established, a judgment can be rendered against the partnership and the partners. On the other hand, there is nothing wrong with the partnership being sued and, if its liability is established, a subsequent suit being filed against the partners on their personal liability for the partnership's obligations. (emphasis supplied). *Id* at 183.

Clogher v. Winston & Strawn, 891 P.2d 240 (Ariz Ct. App. 1995) also provides clear support for Sunseris' position. In *Clogher,* the Plaintiff filed a malpractice action against a law firm and later sought to amend his complaint to include individual partners of the firm. The request was denied as the statute of limitations had run on the claims. The defendant partnership then prevailed on a motion to dismiss contending that the firm's liability must be based on the conduct of its partners and since none could be named in the litigation as a result of the statute of limitations having run, no claim could be asserted against the partnership. On appeal, the *Clogher* Court reversed and stated, "[i]f the partnership is liable for debt, the individual partners are also liable, regardless

of the statute of limitations argument." *Id* at 242. The Court continued its holding: "The dismissal of the lawsuit on the ground that the partners were not named and could not be added to the action was erroneous." *Id* at 242. See also *Faber v. Althoff,* 812 P.2d 1031, 1038 (Ariz. Ct. App. 1990)

Finally, the New York decision *Whitley v. Klauber,* 69 A.D. 2d 99 (1979) is instructive. In that case, a judgment creditor of a limited partnership sought, in a subsequent action, a judgment against the partners. The defendants there sought to dismiss upon a statute of limitations argument. The *Whitley* court reversed the trial court's dismissal holding that the statute of limitations did not commence until judgment was entered against the partnership:

> Respondents contend that the present claim is barred by statute of limitations, asserting that plaintiff's cause of action accrued either in August 1968 when BWD distributed the Bermec stock to the limited partners, or no later than March 1971, when Bermec filed for reorganization under the bankruptcy laws. *However, in order for plaintiff to proceed against the limited partners, it would be necessary for him to establish the unavailability of partnership assets to satisfy his claim. This did not occur until conclusion of the prior litigation against the partnership and its corporate general partner when judgment in that action was entered March 7, 1977* and an appeal from that judgment was dismissed by this court on November 29, 1977. (emphasis supplied). *Id* at 108.

(iii) Liability Of The Partners For A Judgment Rendered Against The Partnership Does Not Accrue Until Entry Of The Judgment.

It is a basic tenant of partnership law that general partners are jointly and severally liable for the debts of the partnership. (See e.g. New York Partnership Law § 26 representing UPA and F.S.A. 620.8306 representing RUPA). Under the Uniform Partnership Act adopted in many states, e.g. Michigan and New York, partners are jointly and severally liable for all debts that are "chargeable" to the partnership.[4] Various jurisdictions that have reviewed the statute of limitations issue presented in this case have held that liability of the partner accrues from the date of entry of the judgment. See *In Re: Jones, supra,* and *Dayco Corp. v. Fred T. Roberts & Co.,* 472 A.2d 780 (1984). These courts have based their decisions on the language of the partnership acts or the entity theory of partnership. Analysis using general principles of statutory construction will arrive at the same result.

Clearly, the New York Judgment constitutes a debt or obligation chargeable to the partnership. However, prior to its entry, the Judgment could not be chargeable to the partnership. Under the general rules of statutory construction, words used in a statute must be given their ordinary meaning unless otherwise defined, and dictionary definitions may be consulted to that end. *U.S. v. Santos,* 128 S.Ct. 2020, 170 L.Ed.2d 76 (2008), relying upon *Asgrow Seed Co v. Winterboer,*

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[4] e.g. MCL 449.15, New York Partnership Law § 26.

513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995).

Blacks Law Dictionary, Fifth Edition (1983) defines "chargeable" as:

> This word, in its ordinary acceptation, as applicable to the imposition of a duty or burden, signifies capable of being charged, subject to be charged, liable to be charged, or proper to be charged. *Id.*

Similarly, Webster's II New College Dictionary, (1999) defines "chargeable" as:

> 1. Suitable to be charged, as to an account <chargeable expenses> 2. Liable to be accused or indicted. *Id*

Based upon the above definitions, it is clear that the New York judgment was not chargeable to the partnership until it was entered. Until its entry, the partnership had no burden or duty to pay the judgment nor was it suitable to be charged such as to an account. Additional support can be gleaned from U.S. Tax Code provisions. The partnership could not have reported the judgment as a charge or expense until the liability became fixed and certain, i.e. entry of the judgment. *See I.R.C. Reg. §1.461-1(a)(2)(ii).*

In short, because the obligation represented by the judgment was not chargeable to the partnership until its entry, the right to enforce the judgment against the partners should not accrue until entry of the judgment. Quite simply, the partners were not liable for anything

until the judgment was entered against the partnership.

This approach is consistent with this Court's decision in *Galletti, supra.* The *Galletti* general partners' extended liability for collection of the tax accrued upon the date of the assessment against the partnership not the date of accrual of the original liability for the tax. In this case the Proctors' liability should accrue upon entry of the judgment as the *Galletti* partners liability for the 10 year collection period accrued upon assessment of the partnership.

B. The Sixth Circuit's Reliance On The Ninth Circuit Rule Is Erroneous.

The Sixth Circuit adopted the approach set forth in *Valley Nat'l Bank of Arizona v. A.E. Rouse & Co.,* 121 F.3d 1332 (9th Cir. 1997), where the Ninth Circuit, after holding that the partners' due process rights were not violated by the filing of the second action and the application of collateral estoppel to prevent relitigation of the issue of partnership liability, nonetheless concluded that the suit against the partners needed to have been brought within the statute of limitations governing the plaintiff's claim against the partnership in the original action. *Id.* at 1338. Because that statute of limitations had expired prior to the plaintiff's suit against the partners, the claim was barred. *Id.*

In making its decision, the Ninth Circuit explicitly rejected *Clogher, supra* claiming as dicta the *Clogher* Court's statement that the partners were liable for debts of the partnership regardless of the statute of limitations argument.

In the present case, the District Court and the Sixth Circuit agreed with the approach taken in *Valley Nat'l Bank* and held that the Appellants needed to bring their claim to enforce the judgment against the partners within the statute of limitations applicable to the original claims against the partnership. This is despite the fact that it took a decade to litigate those claims and that the present case involved different claims. The claims asserted in this second action were not identical to those asserted in the first action nor did they arise out of the same set of facts. The first action arose from facts surrounding the partnership's breach of contract and breach of fiduciary duties which occurred prior to commencement of the first action in 1996. The second action arises from the entry of the judgment in 2005 and the Proctors' status as partners.

(i) *Valley National* Erroneously Characterized Existing Precedent As Dicta.

Valley Nat'l Bank is wrongly decided for several reasons. The first is that it disregarded existing precedent in its own circuit, erroneously referring to it as dicta.

As noted above, the *Clogher* Plaintiff timely commenced an action against a partnership and later filed a Motion to Amend to name the individual partners as parties. The trial court denied the motion based upon the statute of limitations having run as to the partners and dismissed the case because no partners had been named or could be named as defendants. The *Clogher* court held the dismissal was erroneous, stating:

> The dismissal of this lawsuit on the ground that the partners were not named *and could not be added to the action* was erroneous. (emphasis supplied) *Id* at 242.

The above language followed the court's preceding sentence:

> [i]f the partnership is liable for a debt, the individual partners are also liable regardless of the statute of limitations argument. *Id* at 242.

Reading these two statements together, it appears clear that the *Clogher* court interpreted the issue before it on appeal as two pronged: (1) did partners need to be named in a suit against partnership in order to be liable for the claims against the partnership; and (2) can partners be named if the statute of limitations has expired? The court answered the first question by referring to a section of the Arizona Partnership Act then in effect that provided for joint and several liability of partners and answered the second part by stating that they are liable regardless of the statute of limitations. *Id* at 242.

The *Clogher* court clearly recognized that there were two trial court errors in dismissing the case: (1) the partner did not need to named in the litigation in order to be jointly and severally liable for the debts of the partnership; and (2) expiration of statute of limitations after the claim was timely asserted against the partnership has no effect on the partners' liability for the claim. Thus, even though it preceded the court's statement that the trial court's ruling was erroneous, the *Clogher* court's language regarding the statute of limitations being immaterial to the liability

of the partners is not dicta but a necessary component of the court's holding since it explains why the court found the trial court's dismissal to be erroneous. The 9th Circuit's construction of this language as dicta ignores this crucial element of the court's holding.

(ii) *Valley National* Is Contrary To This Court's Ruling In *U.S. v. Galletti.*

The Sixth Circuit's reliance on the Ninth Circuit's rule is also wrong because it is inconsistent with this Court's rule in *Galletti, supra,* where, as previously discussed, this Court held that when the IRS had timely assessed a tax against the partnership taxpayer, it served to extend the statute of limitations for collection of the tax against the partners without the need to separately assess the partners as well since they were, by state law, jointly and severally liable for the debts of the partnership. The Sixth Circuit's adoption of the Ninth Circuit's rule is contrary to this Court's decision in *Galletti.*

(iii) *Valley National* Is Not Consistent With The Entity Theory Of Partnership Law Embodied In UPA And RUPA.

Valley National should also be disregarded because it is not consistent with the "entity theory" which underpins modern partnership law.[5]

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[5] In applying the entity theory of partnership law, as opposed to the aggregate theory, many jurisdictions have recognized that partnerships have entity features: the right to hold title to property, the fact that partners do not have individual rights to possess and use partnership property, the fact that partners are

Neither the UPA nor RUPA provide an *explicit* provision as to when a creditor must file against a partner under the joint and several liability provisions of the Acts. However, RUPA does provide *implicit* guidance. One of the most significant ways in which RUPA differs from UPA is the steps a judgment creditor of the partnership must take before proceeding against the partner's personal assets. This change is consistent with the entity theory of partnership which has replaced the aggregate theory as the controlling model. Under the aggregate model, a plaintiff needed to join all partners in a suit against the partnership; the entity theory, however, treats the partnership, for procedural purposes, as a separate entity that can sue and be sued in its own name without naming all partners. *J. William Callison & Maureen A. Sullivan, Partnership Law & Practice* § 14.4 (2006)

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required to account to the partnership for profits arising from individual use of partnership property, the fact that partners are agents of the partnership and can contractually bind it, and partners have financial relationships with the partnership. *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046 (9th Cir. 1996) quoting from J. William Callison, *Partnership Law and Practice* §3.01, at 3-6 (1992). This Court as well has held that partnerships are sufficiently entity-like such that they could be indicted for violating certain statutes. *United States v. A & P Trucking Co.*, 358 U.S. 121, 79 S.Ct. 203, 3 L.Ed. 2d 165 (1958). See also *Western Laundry and Linen Rental Co. v. U.S.*, 424 F.2d 441, 445 (1970) citing the Court's decision in *U.S. v. A & P Trucking, supra,* when discussing whether the entity theory or aggregate theory is more appropriate: "The Supreme Court has, for the purpose at hand, adopted the entity theory. When the ultimate authority has spoken, there is no room for further debates." *Western Laundry and Linen Rental Co.*, at 445.

The UPA represented a move away from the aggregate theory to the entity theory. *Id.* See also *Alan R. Bromberg and Larry E. Ribstein, Bromberg and Ribstein on Partnership,* §1.03(c)(3), 1.37 (2002-2 supp)[6] RUPA represented an even further move toward entity theory. Under RUPA, the creditor must first obtain a judgment against the partnership and have its execution be returned unsatisfied before pursuing the partner's assets. When discussing the move toward entity theory, some noted commentators have observed: "in this area, there are entity features. The plaintiff often cannot proceed against the partners until after exhausting remedies against the partnership, see R.U.P.A. §307(D). Under this view, the partners are essentially guarantors of an independent partnership debt rather than being directly responsible." *Bromberg and Ribstein, supra,* § 1.03(c)(4) at 1:40.1 (2002-2 supp.).

Under both UPA and RUPA, a partner is jointly and severally liable for the debts of the partnership. And, under both the UPA and the RUPA, the creditor may file against the partnership or any of its partners in the same or a different action. However, under RUPA 307(D) before proceeding against the partner's assets, the creditor must (1) obtain a judgment against the partnership; (2) have its execution be returned unsatisfied from partnership assets; and (3) obtain a judgment against the partner. This creates a two step collection process and represents an increasing shift

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[6] *Bromberg and Ribstein* has been cited an authoritative source on partnership by the Sixth Circuit as well as this Court. *In Re: Ferris,* 41 F.3d 1506 (Ky. Ct. App. 1994); *U.S. v. Craft,* 535 U.S. 274, 122 S.Ct. 1414 (2002).

away from the aggregate theory toward the entity theory.[7]

Sunseris contend the policy clearly underpinning this portion of RUPA is the secondary liability of the partners in accordance with the entity theory. The two step collection process envisioned by the RUPA and the obvious effect of making partners secondarily liable is relevant to the question of when the statute of limitations begins to run. If a creditor must first

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[7] RUPA has been adopted by many states including Florida under which the Macro Partnership elected to be governed.

Florida RUPA 620.8307 states:

(1) A partnership may sue and be sued in the name of the partnership.

(2) An action may be brought against the partnership and, to the extent not inconsistent with §620.8306, any or all of the partners in the same action or in separate actions.

(3) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

(4) A judgment creditor of a partner may perfect a judgment lien but may not proceed against or otherwise levy or execute against the assets of the partner to satisfy a judgment arising from a partnership obligation or liability unless the partner is personally liable for the claim under s. 620.8306 and:

(a) a judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part. . . .

obtain a judgment against the partnership and have its execution be returned unsuccessful before proceeding to collect from the partner, it is only logical that the statute of limitations for claims against the partner accrue upon entry of the judgment against the partnership.

The district court below asserted that its decision was consistent with the entity theory, but in actuality it is consistent with the older, aggregate theory.[8] Under the aggregate theory, where all partners needed to be named in a suit, it is logical that the statute of limitations regarding the partner's liability would begin at the same time as the claims asserted against the partnership. However, under the entity approach, where the partnership can be sued independently of the partners, and under RUPA where collection against the partners may not take place until the partnership's assets are depleted, the statute of limitations on the partner's liability should accrue upon entry of the judgment. The district court's ruling follows the aggregate approach, not the entity approach, and thus propels partnership law backwards, not forward.

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[8] It is important to note that *Valley National* was decided when Arizona operated under the Uniform Partnership Act. Arizona has since adopted the Revised Partnership Act. See *Turley v. Ethington*, 146 P.3d 1282, 1287 (Ariz. 2006).

II. THE SIXTH CIRCUIT'S RULE DEPRIVES THE NEW YORK JUDGMENT OF THE EFFECT IT WOULD HAVE HAD IN NEW YORK IN VIOLATION OF FULL FAITH AND CREDIT CLAUSE.

The full faith and credit clause of the United States Constitution requires every state to give a foreign judgment at least the res judicata effect which the judgment would be afforded in the state which rendered it. See 28 U.S.C. §1738 and *Migra v. Warren City School Dist. Bd of Educ.*, 465 U.S. 75 (1984). Therefore, the New York judgment is entitled to the same effect that it would have in New York. 28 U.S.C. § 1738.

A. According To New York Law, Partners Are In Privity With The Partnership And, Therefore, Are Bound By Rulings And Judgments Entered In Prior Lawsuits Against The Partnership And Would Be Precluded From Relitigating The Underlying Wrongdoings Asserted And Proved Against The Partnership.

Under New York law, parties in privity with the parties in a prior litigation are bound by the substantive rulings and judgments, especially those with respect to all issues that were raised or could have been raised in the prior lawsuit. *Green v. Santa Fe Indus., Inc.*, 514 N.E.2d 105, 108 (N.Y. 1987). It is not necessary that the non-party privy had been subject to personal jurisdiction in the original action. *Buechel v. Bain*, 766 N.E.2d 914, 920 (2001). Partners are deemed to be in privity with their partnership. *Id.* at 920. Moreover, in New York, there is no question

that a judgment rendered against a partnership is enforceable against the general partners. *FMB Systems, Inc. v. Merriam Gateway Associates,* 254 A.D.2d 452, 453 (N.Y. 2d dept. 1998).

B. Under Second Circuit Law, Sunseris Would Not Be Required To Sue The Appellees On The Underlying Misconduct.

In *14th RMA Partners, L.P. v. Reale*, 100 F.3d 278 (2nd Cir. 1996), *supra,* the court therein addressed the issue of whether a judgment creditor of a partnership may seek to collect on that judgment from the assets of its general partners in a second action filed against the partners, or whether the plaintiff must have named the partners in the original litigation against the partnership. The court stated that a creditor could file a second suit to obtain judgment against the partner. In the second suit, the court expressly stated that the creditor need only allege and prove the defendants status as a partner:

> If there is a subsequent suit, however, it is only for the purpose of affording the partner the opportunity to contest the limited issue of whether or not the defendant is, in fact, the general partner of the partnership. *Id* at 280.

Thus, under Second Circuit law, a creditor enforcing a partnership judgment against its general partners need only file a second suit against the general partner to allege and prove his status as a general partner. The only factual issue to be established is the defendant's status as a partner. It is not necessary to relitigate the underlying misconduct that resulted in the judgment against the partnership. *Id.*

There is no New York statute or case law that would require a judgment creditor in an action to enforce a partnership judgment against the partner, to sue the partner within the limitations period applicable to the original causes of action based upon the underlying misconduct. In fact, the only New York case law regarding the topic, *Whitley, supra* instructs that the statute of limitations begins to run on the date of the judgment against the partnership. Consequently, the Sixth Circuit's application of the limitations period for the underlying causes of action to the collection action against the partners deprives the New York judgment of the effect it would have had in violation of the Full Faith and Credit Clause.

CONCLUSION

Sunseris contend that policy considerations, statutory construction and case law support their position that the right to enforce the judgment against the partners should accrue upon entry of the judgment. The holding in *In Re: Jones, supra,* could not be any clearer on this issue. Similarly, applicable partnership law establishes that a partner is liable for the debts that are chargeable to the partnership. The judgment could not be chargeable until it was entered. Moreover, the two-step collection process outlined in the Revised Uniform Partnership Act as adopted by Florida and other states, as well as the pronouncements of this Court which are consistent with the entity theory, clearly instruct that a partner is secondarily liable for the debts of the partnership. As such, claims to enforce the judgment should not accrue until entry of the judgment.

For the above reasons, Sunseri respectfully request that this Court grant the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF THOMAS R. WAELCHLI

THOMAS R. WAELCHLI (P-40468)
100 West Big Beaver Road, Suite 385
Troy, Michigan 48084
(248) 526-9595

Attorney for Petitioners

Dated: November 14, 2008

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-1715

[Filed: August 18, 2008]

JACK SUNSERI; CONSOLIDATED PARTNERS, LIMITED,	)
Plaintiffs-Appellants,	)
v.	)
PHYLLIS PROCTOR; CONRAD PROCTOR; DAVID PROCTOR; CONRAD A. PROCTOR FAMILY TRUST; PHYLLIS PROCTOR FAMILY TRUST; ANDERSON-PROCTOR TRUST; PHYLLIS D. PROCTOR TRUST; ANDERSON-PROCTOR FAMILY LIMITED PARTNERSHIP; PROCTOR, LLC; ANDERSON-PROCTOR, LLC,	)
Defendants-Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: DAUGHTREY, COOK, and FARRIS,* Circuit Judges.

COOK, Circuit Judge. In order to enforce a prior judgment against general partnership Macro Cellular Partners ("Macro"), plaintiffs Jack Sunseri and Consolidated Partners, Ltd. (collectively, "Sunseri"), seek to reach the individual assets of defendant partners (collectively, the "Proctors") unnamed in the original suit. The district court granted summary judgment for the Proctors, concluding that Sunseri's claims against the Proctors accrued with the claims against the partnership and the relevant statutes of limitations now barred the action. Review of the briefs and record counsels us to agree with the district court. Because a separate opinion would add little to the district court's analysis, we affirm the court's judgment, adopting its reasoning.

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* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 05-73108

[Filed: May 2, 2007]

JACK SUNSERI; and CONSOLIDATED PARTNERS, LTD.,

Plaintiffs,

v.

PHYLLIS PROCTOR; CONRAD PROCTOR; DAVID PROCTOR; PHYLLIS D. PROCTOR TRUST; ANDERSON-PROCTOR LIMITED PARTNERSHIP; PROCTOR, L.L.C.; and ANDERSON-PROCTOR, L.L.C.,

Defendants.

HON. LAWRENCE P. ZATKOFF

OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Port Huron,

State of Michigan, on May 2, 2007

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on the parties' cross-motions for summary judgment. Defendants filed their Motion for Summary Judgment (Docket #59) on February 15, 2007, based on various statutes of limitations. Plaintiffs filed their Motion for Summary Judgment (Docket #60) on February 15, 2007, on the basis of collateral estoppel. Both motions have been fully briefed. The Court finds that the facts and legal arguments are adequately presented in the parties' papers and the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. MICH. LR 7.1(e)(2), it is hereby ORDERED that the motions be resolved on the briefs submitted. For the following reasons, Defendants' Motion for Summary Judgment will be GRANTED and Plaintiffs' Motion for Summary Judgment will be DENIED.

II. BACKGROUND

This matter arises out of a dispute between partners in a general partnership and involves a long and complex set of facts.[1] However, the facts relevant to these motions are fairly simple and straight forward. The basis for the current suit is a judgment in

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[1] A detailed background is set forth in the Court's November 3, 2006, Opinion and Order. *See* Docket #53.

the amount of $5,984,686.01 in Plaintiffs' favor entered on April 8, 2005, by a New York court against Macro Cellular Partners ("Macro"), a general partnership. Defendants in the current suit were allegedly partners in Macro. Plaintiffs brought the current suit seeking to collect the unsatisfied portion of the New York judgment from Defendants' personal assets.

In August 1996, Plaintiffs filed suit in the Supreme Court of New York, asserting several causes of action: injunctive relief, negligence, breach of contract, conversion, breach of fiduciary duties, and conspiracy. Plaintiffs' claims were based on their allegation that Macro had wrongfully withheld or intentionally converted their share of CCI preferred stock received by Macro. The New York court subsequently granted summary judgment in Plaintiffs' favor on their claim that Macro breached the partnership agreement. The Court stated that Macro breached the agreement by "withholding from Plaintiffs their rightful share of partnership distributions." *See* Defs.' Ex. C at 11-12. Based on Plaintiffs' New York complaint, the breach occurred in 1994 and 1995, when Macro withheld various distributions, and in August 1996 when it refused to pay proceeds attributable to a stock redemption.

The New York court conducted a bench trial in February 2004 on the issues of damages attributable to Macro's breach of the partnership agreement, whether Macro breached its fiduciary duties to Plaintiffs by withholding distributions, and whether it was liable for conversion. *See* Defs.' Ex. F at 2. In February 2005, the New York court issued its Post-Trial Decision. *See id.* In its decision, the New York court found Plaintiffs were entitled to $186,666

for the breach of contract, and that Macro had breached its fiduciary duties in August 1996 by failing to properly respond on Plaintiffs' behalf to a notice of redemption that would have entitled Plaintiffs to convert preferred stock into common stock. *See id.* at 44. The court also ruled that Plaintiffs' abandoned their conversion claim. *See id.* The New York court then entered judgment against Macro only. Following the judgment, Plaintiffs have pursued the individual partners to satisfy Macro's debt.

III. LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *accord Turner v. City of Taylor*, 412 F.3d 629, 637 (6th Cir. 2005).

IV. ANALYSIS

The issue before the Court is whether Plaintiffs' claim to satisfy a judgment against a partnership through the personal assets of the individual partners is barred by the applicable statutes of limitations where Plaintiffs obtained judgment against the partnership in New York but neither named nor served the individual partners as defendants, and Plaintiffs' claims on the original partnership debt accrued no later than August 1996. Defendants argue that since the New York judgment cannot be enforced against their personal assets, Plaintiffs' only recourse was to sue Defendants for the underlying misconduct. Plaintiffs, on the other hand, contend that their claim

did not accrue until they obtained judgment against the partnership and, therefore, their claim is not untimely. The Court finds Defendants' argument more persuasive.

A. When Plaintiffs' Claims Accrued

In *Valley Nat'l Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332 (9th Cir. 1997), the court found that the plaintiff's claims against the defendants' individual assets were barred by the statute of limitations. There the plaintiff obtained a judgment against a partnership that was insolvent. Thereafter, the plaintiff attempted to enforce the judgment against the partners' individual assets. Since the partners were neither named nor served in the original suit, the court found that the judgment could not be enforced against their personal assets but collateral estoppel could be applied in the second suit to prevent the partners from relitigating the issue of partnership liability. *See id.* at 1337-38. Despite this finding, the court concluded that the statute of limitations barred the plaintiff's suit. *See id.* As the partners were not bound by the judgment in the first case, the plaintiff's only recourse was to proceed against the partners in a second suit making use of collateral estoppel. *See id.* However, the suit against the partners still needed to be brought within the applicable statute of limitations governing the plaintiff's claim for the original partnership obligation. *See id.* Because the statute of limitations had expired prior to the plaintiff's suit for the partners' individual assets, the claim was barred. *See also Gutrich v. Cogswell & Wehrle*, 961 P.2d 1115 (9th Cir. 1998) (holding that because plaintiffs failed to sue the individual defendants until after the statute of

limitations had run on the underlying action, the subsequent suit was barred).

The Court agrees with the result reached in *Valley Nat'l Bank*. The Court finds that this result is consistent with the policy interests reflected in statutes of limitations and reflects the entity theory of partnerships as well as protects the partners' interests in due process. "Policy considerations behind the enactment of statutes of limitation are: (1) recovering damages promptly; (2) penalizing plaintiffs who are not industrious in pursuing their claims; (3) providing security against stale demands; (4) relieving defendants' fear of litigation; (5) preventing fraudulent claims; and (6) providing a remedy for the general inconvenience resulting from delay." *Lemmerman v. Fealk*, 201 Mich.App. 544, 547 (1993), *rev'd on other grounds by* 449 Mich. 56 (1995). In contrast to the common law where a plaintiff could not sue a partnership without joining all of the individual partners, the entity theory of partnerships as expressed in statutes and decisions that treat the partnership as an entity for procedural purposes, facilitates "claims by persons who have dealt with a partnership, but who may find it cumbersome or impossible to find the names and locations of the partners." J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW & PRACTICE § 14.4 (2006). Where, as here, a plaintiff obtains a judgment against the partnership as an entity, but fails to obtain a binding judgment against a partner's individual assets, and consequently cannot enforce that judgment against the partner, the plaintiff must sue the partner based on the underlying misconduct. While the plaintiff may use collateral estoppel to prevent the partner from relitigating the issue of liability, the

plaintiff must still bring suit within the applicable limitations period for the underlying wrong.

The Court recognizes that this holding may require a plaintiff to bring successive lawsuits, and in some situations may prevent a plaintiff from being fully compensated. On the other hand it is foreseeable that a partnership may not have enough assets to satisfy a judgment and plaintiffs can protect themselves by joining as many partners to the original suit as possible. The Court notes that Plaintiffs in the present case, who were partners in Macro, could have also protected themselves by providing for such contingencies in the partnership agreement. Furthermore, the Court is not concerned that this result would lead to deceptive tactics by partners as the plaintiff may make use of equitable tolling principles in situations where partners fraudulently conceal their identities, transfer assets, or where justice otherwise requires.

Plaintiffs' cases are distinguishable and the Court finds Plaintiffs' argument that the statutes of limitations began to run when they obtained judgment in New York unpersuasive. Plaintiffs rely on *Whitley v. Klauber*, 69 A.D.2d 99 (1979), for the proposition that the statute of limitations does not begin to run until after a creditor obtains judgment against the partnership. In contrast to this case, however, *Whitley* involved a limited partnership, which, unlike this case, required the plaintiffs to prove that the limited partnership's assets were exhausted before they could proceed against the limited partners. *See id.* at 108. Here, Plaintiffs could have immediately sued Defendants.

Plaintiffs' reliance on *Clogher v. Winston & Strawn*, 891 P.2d 240 (Ariz. Ct. App. 1995), is also misplaced. The issue before the court in *Clogher* was whether the plaintiff could maintain a suit against a partnership without naming the partners as parties. Based on Arizona's adoption of the entity theory of partnership, the court held that the partners did not have to be joined in order for the plaintiff to sue the partnership. The court did not decide whether the statute of limitations would bar a subsequent suit against the partners.

Similarly, *United States v. Galletti*, 541 U.S. 114 (2004), does not support Plaintiffs' argument. *Galletti* involved the collection of taxes from individual partners in a partnership. According to the Internal Revenue Code, tax assessments must occur within three years after a return is filed or collection is barred. *See id.* at 116. If a tax is assessed within three years, the statute of limitations for collection of the tax is extended by ten years from the date of assessment. *See id.* In *Galletti*, the IRS assessed a tax against a general partnership within three years after its return was filed, but did not assess a tax against the partners. *See id.* at 117-18. More than three years after the partnership return was filed, but less than ten years from the date of assessment, the IRS filed claims for the unpaid taxes against the partners. The partners attempted to avoid payment by arguing that collection was barred because they were not separately assessed within the three year statute of limitations. The Court disagreed, finding that separate assessments against the partners were not necessary because the assessment of a tax against a taxpayer merely consists of calculating the amount of tax owed and recording it in the government's books, and is not

equivalent to a formal collection action against a person or entity who might be liable for the payment of a debt. *See id.* at 122. Contrary to Plaintiffs' assertion, *Galletti* says nothing about whether the statute of limitations bars a subsequent claim against partners who are not bound by a judgment against the partnership.

Finally, Plaintiffs rely on *In re Jones*, 161 B.R. 180 (Bankr. N.D. Tex. 1993). While the court in *Jones* found that the plaintiff's claim against the individual partners accrued when the plaintiff obtained a judgment against the partnership, *Jones* is not binding on this Court. The court's finding in *Jones* was neither supported by case law nor consistent with the purposes behind statutes of limitations. Therefore, the Court declines to follow *Jones*.

Based on the foregoing discussion, the Court concludes that Plaintiffs' claims against Defendants accrued when their claims against the partnership accrued and not when Plaintiffs' obtained a judgment against the partnership.

B. Whether Plaintiffs' Claims are Untimely

The Court's jurisdiction in this case is based on diversity of citizenship and is governed by state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). As the present motion is based on the statute of limitations, this Court must look to Michigan's statutes of limitations regardless of what state's partnership law applies to the substantive issues remaining in this suit. *See Erickson v. American Motors Corp.*, 683 F.Supp. 644, 645-46 (E.D. Mich. 1987). Based on the New York action, Plaintiffs' remaining claims against

Defendants are for a breach of the partnership agreement and for a breach of fiduciary duties.

In Michigan, "a cause of action for breach of contract accrues when a contracting party fails to do what he is obligated to do under the contract." *Jacobs v. Detroit Automobile Interinsurance Exchange*, 107 Mich.App. 424, 431 (1981). Accordingly, "a breach of contract claim accrues on the date of the breach, not on the date the breach is discovered." *Isley v. Capuchin Province*, 880 F.Supp. 1138, 1145 (E.D. Mich. 1995). In the present case, Plaintiffs' breach of contract claim was based on Macro's failure to pay distributions in 1994 and 1995 and when it refused to pay Plaintiffs the proceeds from the redemption of their preferred stock on or about August 16, 1996. Therefore, Plaintiffs' breach of contract claim accrued no later than August 16, 1996. Michigan's statute of limitations for breach of contract is six years. *See* MICH. COMP. LAWS § 600.5807(8). Thus, Plaintiffs' claim for breach of contract expired on August 16, 2002. As such, Plaintiffs' claim for breach of contract is barred by the statute of limitations because Plaintiffs filed the present action on May 18, 2005.

Unlike a claim for breach of contract, "[a] claim for breach of fiduciary duty ... accrues when the beneficiary knew or should have known of the breach." *Prentis Family Foundation v. Barbara Ann Karmanos Cancer Inst.*, 266 Mich.App. 39, 47 (2005) (quoting *Bay Mills Indian Comm. v. Michigan*, 244 Mich.App. 739, 751 (2001)). "[A] plaintiff is deemed to be aware of a possible cause of action when he becomes aware of an injury and its possible cause." *Id.* at 748 (quoting *Shawl v. Dhital*, 209 Mich.App. 321, 325 (1995)). Plaintiffs filed their complaint against the partnership

in New York alleging a breach of fiduciary duties on August 15, 1996. *See* Defs.' Ex. B. Thus there is no question that Plaintiffs were aware of their cause of action on the day they filed their complaint in New York. Michigan's statute of limitations governing breaches of fiduciary duties is three years. *See Miller v. Magline*, 76 Mich.App. 284, 313 (1977). Therefore, Plaintiffs' claim expired no later than August 15, 1999 and, consequently, is untimely because Plaintiffs filed the present action on May 18, 2005.

Finally, the Court does not find that equitable tolling is appropriate in this case. Plaintiffs, as partners in Macro, were well aware of all of the other partners and their locations. Furthermore, as partners in Macro, Plaintiffs were aware of Macro's financial status. Therefore, the Court will not toll the running the applicable limitations periods in this case.

V. CONCLUSION

Plaintiffs' claim in this matter is not to enforce the New York judgment against Defendants, but to obtain a separate judgment against Defendants' individual assets. As is clear from the discussion above, Plaintiffs' claims all accrued no later than August 1996. Therefore, under the applicable statutes of limitations, Plaintiffs' claims are untimely. Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED and Plaintiffs' Motion for Summary Judgment is DENIED as moot.

IT IS FURTHER ORDERED that Plaintiffs' claim is HEREBY DISMISSED.

IT IS SO ORDERED.

S/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: May 2, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 05-73108

[Filed: May 2, 2007]

JACK SUNSERI; and CONSOLIDATED PARTNERS, LTD.,	)
Plaintiffs,	)
v.	)
PHYLLIS PROCTOR; CONRAD PROCTOR; DAVID PROCTOR; PHYLLIS D. PROCTOR TRUST; ANDERSON-PROCTOR LIMITED PARTNERSHIP; PROCTOR, L.L.C.; and ANDERSON-PROCTOR, L.L.C.,	)
Defendants.	)

HON. LAWRENCE P. ZATKOFF

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Opinion and Order dated May 2, 2007, Plaintiffs' Complaint is DISMISSED WITH PREJUDICE.

Dated at Detroit, Michigan, this 2nd day of May, 2007.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Marie E. Verlinde

APPROVED:

s/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 05-73108

[Filed: November 3, 2006]

JACK SUNSERI; and CONSOLIDATED PARTNERS, LTD.,	)
Plaintiffs,	)
v.	)
PHYLLIS PROCTOR; CONRAD PROCTOR; DAVID PROCTOR; PHYLLIS D. PROCTOR TRUST; ANDERSON-PROCTOR LIMITED PARTNERSHIP; PROCTOR, L.L.C.; and ANDERSON-PROCTOR, L.L.C.,	)
Defendants.	)

HON. LAWRENCE P. ZATKOFF

OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Port Huron, State of Michigan, on November 3, 2006

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This case is before the Court upon cross-motions for summary judgment. Plaintiffs filed their Motion for Summary Judgment (Docket # 36) on August 4, 2006, and Defendants responded on September 7, 2006. On August 7, 2006, Defendants filed their own Motion for Summary Judgment (Docket # 39), to which Plaintiffs responded on September 7, 2006. Each party has since filed a reply to the other's response, along with hundreds of pages of exhibits. The Court finds that the facts and legal arguments are adequately presented in the parties' papers and the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. MICH. LR 7.1(e)(2), it is hereby ORDERED that the motion be resolved on the briefs submitted. For the following reasons, Defendants' Motion for Summary Judgment will be GRANTED IN PART and DENIED IN PART, and Plaintiffs' Motion for Summary Judgment will be DENIED.

II. BACKGROUND

This case arises out of a dispute between alleged partners in a general partnership, and dates back over eighteen years. The basis for the current suit is a judgment in the amount of $5,984,686.01 in Plaintiffs' favor entered on April 8, 2005, by a New York court against Macro Cellular Partners ("Macro"), a general

partnership. (*See* Docket # 45, Ex. 13). Defendants in the current suit were allegedly partners in Macro. Plaintiffs brought the current suit seeking to collect the unsatisfied portion of the New York judgment from Defendants' personal assets. (*See* Pls.' Compl.).

Macro was formed in 1988 as a general partnership with the purpose of participating in Federal Communications Commission ("FCC") cellular phone lotteries. (*See* Docket # 45, Ex. 1). Participants in these lotteries sought licenses for cellular airspace in rural markets throughout the country. Macro initially consisted of ten general partners, each owning a 10% interest in the partnership. (*See id.*). Defendant Conrad Proctor, a Michigan ear, nose and throat doctor who had been involved with other similar ventures, introduced the opportunity to become a partner in Macro to his son David. (*See* Docket # 36, Ex. A at 27-31, 80, 83). On June 7, 1988, David agreed to become an original partner in Macro, and Conrad paid for David's initial capital contribution. (*See* Docket # 45, Ex. 1; Docket # 36, Ex. A at 86-88, C). Conrad also paid for many of David's subsequent capital calls to Macro and, to his knowledge, David has not personally paid any money to Macro. (*See* Docket # 36, Ex. A at 86-88, C). David executed a general power of attorney in favor of Conrad in September 1990, which gave Conrad full authority to act on David's behalf with regard to Macro. (*See* Docket # 36, Ex. E).

In 1989, Macro won a FCC lottery and was awarded a license for the Ohio-4 RSA Cellular Market. Macro originally intended to develop this market, but agreed to sell its license to Cellular Communications, Inc. ("CCI"), in 1991 for several installments of cash and stock totaling approximately $20 million. Several

months prior to the agreement with CCI, on January 2, 1991, Conrad Proctor, on David's behalf, drafted a letter to Macro, which David signed, instructing the managing partner to transfer his "interest in the Ohio-4 RSA Cellular Market" to his mother, Phyllis D. Proctor. (*See* Docket # 36, Ex. A at 132, G). Thereafter, on February 9, 1991, Conrad Proctor again wrote to the managing partner of Macro, this time on Phyllis's behalf, informing the partner that Phyllis transferred "all rights, title and interest" in the "10% interest in Ohio-4 RSA Cellular Market" to the Phyllis D. Proctor Trust. (*See* Docket # 36, Ex. A at 132, H). Nearly a year later, on February 3, 1992, Conrad, writing on Phyllis's behalf, instructed the managing partner to transfer Phyllis's "interest in the Ohio-4 RSA Cellular Market to: Phyllis D. Proctor Trust." (*See* Docket # 36, Ex. A at 132, I). The Proctors have indicated that these transfers were limited to an income interest in the partnership and did not purport to transfer a partnership interest. (*See* Docket # 45, Ex. 28 at 80, Ex. 7 at 50-51). Furthermore, Phyllis Proctor has stated that she never intended to become a partner in Macro. (*See* Docket # 45, Ex. 7 at 72-73).

After receiving the interest from David Proctor, Phyllis was identified as a general partner in Macro by several Macro documents. (*See* Docket # 36, Ex. J, K, N). Specifically, Phyllis signed and seconded partnership resolutions that identify her as a general partner in Macro. (*See* Docket # 36, Ex. J, K). Moreover, Macro meeting minutes refer to Phyllis as a general partner and indicate that she was present, either in person or by proxy, at meetings on February 16, 1992, April 17, 1992, and April 17, 1993. (*See* Docket # 36, Ex. K, N). Phyllis, however, testified at her deposition that she had no memory of signing any

documents, but acknowledged that they bear her signature. (*See* Docket # 45, Ex. 7 at 50-51, 72-73). Conrad Proctor indicated that these documents were signed at the request of Macro's attorney and managing partner because he and Phyllis trusted their judgment. (*See* Docket # 45, Ex. 9 at 206-07). Furthermore, Phyllis expressly denied ever attending any partnership meeting, participating in any partnership conference call, or participating in any partnership business whatsoever. (*See* Docket # 45, Ex. 7 at 72-73).

In 1992 or 1993, Macro was threatened with litigation by a company called Astronet. In response to this threat, Conrad Proctor drafted a letter to Macro, on behalf of Phyllis, informing the partnership that she intended to resign as a general partner. (*See* Docket # 36, Ex. A at 144-46, P). The Proctors also drafted another letter in which they state that the transfer from David to Phyllis in 1991 only transferred David's income interest in Macro. (*See* Docket # 36, Ex. P). The Proctors have since stated that these letters were drafted on the advice of counsel to clarify that Phyllis was never intended to be a partner in Macro. (*See* Docket # 45, Ex. 9 at 206-07).

Various other documents also identify Conrad and Phyllis Proctor as partners in Macro. From 1991 to 1994, Phyllis Proctor received K-1 tax forms for her income from Macro that refer to her as a general partner. (*See* Docket # 36, Ex. R). Furthermore, a letter from Macro's general partner in 1992 in connection with the Proctors' mortgage application states that they are 10% owners of Macro. (*See* Docket # 36, Ex. V).

Plaintiff Jack Sunseri acquired his interest in Macro by an assignment from his father, Anthony Sunseri, in July 1991. (*See* Docket # 36, Ex. DD). That same year, Macro moved its principal place of business from California to Florida, and subsequently resolved to be governed under Florida law, retroactive to September 1991. (*See* Docket # 39, Ex. B). Beginning in 1992, a dispute arose between the Sunseris and the other partners in Macro involving the management of the partnership and various other partnership decisions. As part of this dispute, Macro resolved to withhold distributions to the Sunseris to off-set litigations costs the other partners attributed to the Sunseris. (*See* Docket # 46, Ex. B at 9-10). The bulk of the withholdings consisted of the proceeds of the agreement with CCI in 1991. (*See id.*)

Also in 1992, Jack Sunseri, believing that Conrad Proctor was a partner in Macro, gave him two proxies to vote at Macro partnership meetings. (*See* Docket # 36, Ex. DD). Jack Sunseri, although nominating David Proctor for a partnership management position prior to giving Conrad proxies, and referring to David Proctor as a Macro partner after, believed that due to Conrad's involvement with Macro, Conrad Proctor was a partner. (*See id.;* Docket # 45, Ex. 17, 18). Jack Sunseri has stated that based on his personal knowledge David Proctor did not participate in any partnership business. (*See* Docket # 36, Ex. DD). However, there is some indication that Jack Sunseri never physically attended any partnership meetings. (*See* Docket # 46, Ex. B at 9).

In 1996, Anthony Sunseri filed suit in California against Macro to recover the distributions he felt were wrongfully withheld. In connection with this litigation,

Jack Sunseri filed a declaration stating that his father, Anthony Sunseri, was the general partner in Macro and was entitled to the Sunseri share of Macro's profits. (*See* Docket # 39, Ex. C). However, the California court dismissed this case with prejudice as a sanction for Anthony Sunseri's failure to appear at a deposition.

Later in 1996, Plaintiffs commenced suit in New York against Macro. Plaintiffs served the current Defendants with a copy of the summons and complaint for the New York action, but did not name them as parties. (*See* Docket # 36, Ex. S). Plaintiffs asserted that Macro had breached the partnership agreement, breached its fiduciary duties, and deprived Jack Sunseri of his share of the Macro profits. (*See* Docket # 45, Ex. 11). All of the claims were predicated on Plaintiffs' assertion that Macro had wrongfully withheld or intentionally converted the Sunseris' share of the profits in Macro. (*See id.*). Plaintiffs sought $1.8 million in compensatory damages. Essential to Plaintiffs' request was the fact that CCI merged with a company called Airtouch Communications, which gave the partners in Macro, as holders of CCI stock stemming from the 1991 agreement, an option to convert their shares into common stock or cash. The Sunseris' share was eventually converted to cash and held by the New York court pending the outcome of the litigation. Also significant was the fact that the surviving company of the Airtouch/CCI merger announced a later merger with yet another wireless company, the Vodaphone Group, adding further value to the Sunseri share.

In May 1998, the New York court granted Plaintiffs partial summary judgment on their claim of breach of

the partnership agreement. (*See* Docket # 39, Ex. E). The court then released approximately $1.4 million to the Sunseris. Later in the litigation, in relation to a counterclaim, Conrad Proctor testified on behalf of Macro. (*See* Docket # 50, Ex. L). Plaintiffs assert that he admitted his status as a partner in Macro during his testimony. However, Plaintiffs have taken the one line of testimony out of context and, as Defendants make clear, Conrad Proctor clarified his statement, unambiguously stating that David, not he, was the partner in Macro. (*See id.*).

In 1999, Plaintiffs sought leave to amend their complaint in order to add additional claims and to join all of the Macro partners individually to the suit, including Defendants in the present case. (*See* Docket # 39, Ex. F). The court granted substantially all of the motion save for Plaintiffs' request join the partners individually. (*See id.*). The court concluded that to add additional parties after pursuing the partnership alone for nearly four years would be severely prejudicial and a waste of judicial resources. (*See id.*). Following this denial, Plaintiffs filed a virtually identical suit in Florida federal court, naming the individual partners as defendants. (*See* Docket # 39, Ex. G). In connection with the Florida suit, Defendants submitted affidavits in which they state they were general partners in Macro at all relevant times. (*See* Docket # 36, Ex. X). Defendants now claim that, due to attorney oversight, the affidavits were erroneous insofar as they identified Defendants as partners in Macro. (*See* Docket # 45, Ex. 9 at 274-75, Ex. 21). Nevertheless, the Florida court, without considering the affidavits, dismissed the suit for lack of subject matter jurisdiction because the parties were not completely diverse. (*See* Docket # 39,

Ex. H). This decision was affirmed by the Eleventh Circuit. (*See id.*).

Finally, in 2005, after over a decade of litigation, the New York court ruled that Macro had wrongfully failed to properly respond on Plaintiffs' behalf to the notice from CCI regarding converting the Sunseri CCI preferred stock into CCI common stock, and entered a judgment against Macro in the amount of $5,984,686.01. (*See* Docket # 39, Ex. I; Docket # 46, Ex. B). This figure was based on the trial court's finding that the Sunseris would have held the stock to gain the benefit of the subsequent merger between Airtouch/CCI and the Vodaphone Group in 1999.

Unfortunately for Plaintiffs, Macro had no assets from which to satisfy this judgment. (*See* Docket # 46, Ex. L). Plaintiffs now seek to collect from the personal assets of Macro's partners, who are jointly and severally liable for this debt. (*See* Pls.' Compl.). Plaintiffs have successfully collected against at least one partner already in Texas. (*See* Docket # 46, Ex. J).

Plaintiffs filed their motion for summary judgment claiming that Defendants are general partners in Macro and, as such, are jointly and severally liable for the partnership obligation resulting from the New York judgment. (*See* Docket # 36). Defendants also filed for summary judgment arguing that the New York judgment cannot be enforced against them because they were not subject to personal jurisdiction in New York and were not parties to that action. (*See* Docket # 39).

III. LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. PRO. 56(c); *accord Turner v. City of Taylor,* 412 F.3d 629, 637 (6th Cir. 2005); *Johnson v. Karnes,* 398 F.3d 868, 873 (6th Cir. 2005). When deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Harbin-Bey v. Rutter,* 420 F.3d 571, 575 (6th Cir. 2005). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). *See Leadbetter v. Gilley,* 385 F.3d 683, 689-90 (6th Cir. 2004); *Weaver v. Shadoan,* 340 F.3d 398, 405 (6th Cir. 2003). A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson,* 477 U.S. at 249 (citations omitted). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

The moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once

the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. *See* FED. R. CIV. PRO. 56(e); *Celotex*, 477 U.S. at 324. Thus, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts; it must present significant probative evidence in support of its complaint to defeat the motion for summary judgment. *See Matsushita*, 475 U.S. at 586; *Stephenson v. Allstate Ins. Co.*, 328 F.3d 822, 826 (6th Cir. 2003); *Gaines v. Runyon*, 107 F.3d 1171, 1174-75 (6th Cir. 1997). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *accord Daniels v. Woodside*, 396 F.3d 730, 734 (6th Cir. 2005).

These same rules of review also apply where the parties have filed cross-motions for summary judgment. *See Westfield Ins. Co. v. Tech Dry Inc.*, 336 F.3d 503, 506 (6th Cir. 2003); *In re Markowitz*, 190 F.3d 455, 463 n.6 (6th Cir. 1999). The court must evaluate each motion on its own merit and draw inferences against the party whose motion is being considered. *See Markowitz*, 190 F.3d at 463 n.6; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994). Just because both sides have filed motions for summary judgment does not mean that the case must be decided by summary judgment. *See Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). The filing of a motion for summary judgment by one party also does not preclude that party from arguing that there are issues of fact which preclude the granting of summary judgment to the adversary

party. *See Cherokee Ins. Co. v. E.W. Blanch Co.*, 66 F.3d 117, 123 n.4 (6th Cir. 1995).

IV. ANALYSIS

In the present case, the parties have filed cross-motions for summary judgment. Accordingly, the Court will discuss each in turn. However, because Defendants' motion could be dispositive of the entire case, it will be discussed first.

A. Defendants' Motion for Summary Judgment

Defendants move for summary judgment based on two constitutional arguments. Defendants argue first that they cannot be bound by the New York judgment against Macro because they did not have sufficient contacts with New York such that the New York court could not assert personal jurisdiction over them. Consequently, Defendants claim, the New York judgment cannot be given full faith and credit in this Court, and Plaintiffs' case should be dismissed. Second, Defendants argue that Due Process requires the Court to dismiss Plaintiffs' claims because Defendants were neither served as parties to the New York litigation, nor did they appear to contest any claims against them. The facts concerning the issues of personal jurisdiction, full faith and credit, and due process are not disputed; however, the legal conclusions to be drawn from those facts are in dispute.

1. Personal Jurisdiction and Full Faith and Credit

As an initial matter, having reviewed the parties' submissions thus far the Court concludes that the issue presented is not whether full faith and credit requires the Court to dismiss the case, but whether Plaintiffs should be forced to relitigate the issue of Macro's liability. Defendants claim that because they were not subject to personal jurisdiction in New York, the Court cannot execute the New York judgment against their personal assets. However, this is not what Plaintiffs ask the Court to do. Instead, Plaintiffs argument is based on the fact that full faith and credit requires the Court to recognize the validity of the judgment as to Macro. As will be discussed below, the valid judgment against Macro, while not enforceable against Defendants' personal property, can be used to preclude the relitigation of issues necessarily decided in New York.

Full faith and credit demands that states give maximum recognition to valid judgments entered by a court in a sister state. *See* U.S. Const. art. IV, § 1. The Full Faith and Credit Act extends this principal to federal courts and requires that "such ... judicial proceedings ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738. Thus a federal court must give maximum recognition to a valid state court judgment. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984). However, full faith and credit need not be given to a judgment rendered against a person who was not subject to that court's jurisdiction. *See W. Union Telegraph Co. v.*

Gotlieb, 368 U.S. 71, 75 (1961) ("[A] state court judgment need not be given full faith and credit ... as to parties not subject to the jurisdiction of the court that rendered it."). Thus where the court in the first cause of action did not have the power to enter a judgment against an individual because it lacked personal jurisdiction, a second court does not have to afford the first court's judgment full faith and credit. *See id.*

There is no question that the New York court did not have personal jurisdiction over Defendants, and could not render a judgment against them personally. Defendants' evidence, principally their affidavits, establishes that they have virtually no contact with the State of New York such that they could be subject to personal jurisdiction there. (*See* Docket # 42). There is no evidence that any of the current Defendants ever had a physical presence in New York, conducted business there, committed a tort or caused an injury to occur there, or consented to New York's jurisdiction. Plaintiffs cannot dispute these facts and have only presented evidence that Defendants received a copy of the summons and complaint from the New York court. Nevertheless, without a basis for asserting personal jurisdiction, a summons and complaint could not have subjected Defendants to personal jurisdiction in New York. *See* 16 *Moore's Federal Practice* § 108.01(2) (Matthew Bender 3d ed. 2000). Therefore, the Court agrees with Defendants that the New York judgment against Macro cannot be extended to reach their personal assets. However, the Court finds that the lack of personal jurisdiction over Defendants does not deprive the New York judgment against Macro of all validity.

The New York judgment is entitled to the same full faith and credit it would receive in New York. *See* 28 U.S.C. § 1738. It is undisputed that the New York court had personal jurisdiction over Macro because it waived this defense by not raising it in a timely manner. Therefore, the New York judgment is entitled to the same full faith and credit from this Court as it would receive in New York as to Macro. Consequently, while the judgment cannot be executed against Defendants' personal assets, the issues necessarily decided against Macro may be given preclusive effect against Defendants should any of them be determined to be partners in Macro.

The broad doctrine of res judicata encompasses both claim preclusion (res judicata) and issue preclusion (collateral estoppel). *See Wilkins v. Jakeway,* 183 F.3d 528, 532 (6th Cir. 1999); *J.Z.G. Res., Inc. v. Shelby Ins. Co.,* 84 F.3d 211, 214 (6th Cir. 1996). Under issue preclusion, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving any party to the prior litigation. *See Montana v. United States,* 440 U.S. 147, 153-54 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5, (1979); *Stern v. Mascio,* 262 F.3d 600, 608 (6th Cir. 2001); *Electrical Workers Local 58 Pension Trust Fund v. Gary's Elec. Serv. Co.,* 227 F.3d 646, 659 (6th Cir. 2000). The party seeking the benefit of issue preclusion bears the burden of proof. *See Browning v. Levy,* 283 F.3d 761, 771-72 (6th Cir. 2002). When the prior judgment was entered in state court, that judgment is entitled to the same preclusive effect that it would receive under the law of the state where it was entered. *See Migra,* 465 U.S. at 80-85; *Stemler v.*

Florence, 350 F.3d 578, 586 (6th Cir. 2003), *cert. denied,* 125 S.Ct. 61 (2004). The state's law of collateral estoppel will be consulted to determine preclusion. *See McKinley v. City of Mansfield,* 404 F.3d 418, 428 (6th Cir. 2005).

Under New York law, "[t]he doctrine of collateral estoppel precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." *Kaufman v. Eli Lilly & Co.,* 65 N.Y.2d 449, 455 (1985) (internal quotations omitted). Avoiding relitigation of a decided issue and the possibility of an inconsistent result are the policies underlying its application. *See Buechel v. Bain,* 97 N.Y.2d 295, 303 (2001). Two requirements must be satisfied before the doctrine is invoked: "[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." *Kaufman,* 65 N.Y.2d at 455. New York courts have noted, however, that collateral estoppel is "an equitable doctrine ... grounded on concepts of fairness and should not be rigidly or mechanically applied." *D'Arata v. New York Cent. Mut. Fire. Ins. Co.,* 76 N.Y.2d 659, 663 (1990). "In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results." *Staatsburg Water Co. v. Staatsburg Fire Dist.,* 72 N.Y.2d 147, 153 (1988) (citations omitted).

New York courts have analyzed the full and fair adjudication requirement, and precluded partners from relitigating issues decided in a prior litigation against the partnership, based on the concept of privity. *See Buechel,* 97 N.Y.2d 295. *See also Chase Manhattan Bank, N.A., v. Celotex Corp.,* 56 F.3d 343 (2nd Cir. 1995) (applying New York law on issue of res judicata); *FMB Systems, Inc. v. Merriam Gateway Assoc.,* 254 A.D.2d 454 (1998). "In analyzing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have *a relationship that would justify preclusion,* and whether preclusion, with its severe consequences, would be *fair under the particular circumstances." Buechel,* 97 N.Y.2d at 304-05 (emphasis added). This entails a functional analysis of the formalities of the legal relationship, focusing on the incentives and interests of the earlier party compared to those of the party against whom issue preclusion in sought. *See id.* at 304; *Chase Manhattan,* 56 F.3d at 346.

In the New York litigation between Macro and the current Plaintiffs, the court necessarily decided the issue of Macro's liability to Plaintiffs and the amount of damages. Because partners in a general partnership have potentially unlimited liability for partnership debts, the partners in Macro had the same incentives and interests as Macro in defending against Plaintiffs' claims in the earlier suit, at least on the issue of Macro's liability. The New York litigation took place over nearly ten years and the parties thoroughly litigated the issues of liability and damages. Fairness and the need for stability and conclusiveness in judgments dictate that a partner having the same interests and incentives as the partnership should not

be allowed to relitigate the issues of partnership liability when those interests and incentives were already scrupulously advanced by the partnership, regardless of whether he was a named party to the prior suit or subject to personal jurisdiction.

However, since the issue of whether collateral estoppel actually applies in this case is not before the Court on the present motion, it is sufficient to state that the lack of personal jurisdiction over Defendants in the New York litigation does not warrant dismissing Plaintiffs' claim. While Defendants correctly state the application of full faith and credit as to the enforcement of foreign judgments in that a foreign judgment cannot be enforced against a party that was not subject to personal jurisdiction in the first action, Plaintiffs are not requesting the Court to execute the New York judgment. Instead, Plaintiffs are seeking a subsequent judgment against Macro's partners individually. In other words, Plaintiffs do not claim that the New York judgment entitles them to levy against Defendants' personal property; rather they argue if any or all Defendants in the current action are found to be partners in Macro, then they should be collaterally estopped by the factual findings of the New York court as to Macro's liability to Plaintiffs. The existence of personal jurisdiction in the first action is not necessary to give the factual findings from the first action preclusive effect in a subsequent action. Therefore, Defendants' argument that the New York judgment cannot be enforced against them as a matter of full faith and credit simply does not address the real issue in this case.

As will be discussed below, there are genuine factual issues as to whether or not certain individuals

or entities were partners in Macro. If found to be partners in Macro, then the principles of collateral estoppel may preclude those Defendants from relitigating issues necessarily decided in the New York litigation. This is because their interests as to these issues would have been sufficiently advanced and protected by Macro's defense in the New York litigation, not because the New York judgment automatically rendered them liable to Plaintiffs. Plaintiffs still must demonstrate that Defendants were partners in Macro and that collateral estoppel actually does apply.

2. Procedural Due Process

Defendants next contend that to hold them personally liable based solely on the New York judgment would violate their right to procedural due process. Defendants argue that they were not parties to the New York litigation, did not receive notice as parties, and did not appear as parties. Thus, Defendants claim that holding them liable to Plaintiffs based solely on the New York judgment would violate their fundamental rights of notice and an opportunity to be heard. Contrary to Defendants' contention, however, they would not be held personally liable based solely on the New York judgment. The parties have not presented, and the Court's independent research has not found, any controlling authority on this issue. However, this issue has been considered by several other circuits and state courts, and the Court finds these decisions persuasive. *See Valley Nat'l Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332 (9th Cir. 1997); *14th RMA Partners, L.P. v. Reale*, 100 F.3d 278 (2nd Cir. 1996); *U.S. v. Sohn*, 971 F.Supp. 488 (D.Or. 1997); *Duncan, Inc. v. Head*, 519 So.2d 1305 (Ala.

1988); *Dayco Corp. v. Fred T. Roberts & Co.*, 192 Conn. 497 (1984); *Warner v. Lancia*, 46 Conn.App. 150 (1997); *Brunsoman v. Seltz*, 414 N.W.2d 547 (Minn. 1988).

The Connecticut Supreme Court addressed the issue of due process concerning partners in a general partnership in *Dayco*. In *Dayco*, an arbitration award was entered against a general partnership and the state court confirmed the award against the partnership only. *See Dayco*, 192 Conn. at 499. The defendant was present at the arbitration proceeding but was not named and did not appear as an individual defendant. *See id.* When the partnership failed to pay the judgment, the plaintiff commenced suit against the general partners individually. *See id.* at 500. The defendant claimed that he could not be held personally liable as a matter of due process since he was not named as a defendant in the arbitration proceeding and judgment was entered against the partnership only. *See id.* at 501. The Connecticut Supreme Court disagreed.

The court first noted that under the Connecticut partnership statute, partners in a general partnership were jointly liable for all partnership obligations. *See id.* The court then rejected the defendant's argument that in order to hold the partners personally liable for a judgment entered against the partnership only they would have to be named and personally served as defendants at the beginning of litigation stating:

> What these statutes reveal is axiomatic: in an action against a partnership, in which only the partnership is named as a defendant and the result is a judgment against the partnership, a

> plaintiff cannot attach the individual property of the partners or levy upon their individual property. *This does not prevent a plaintiff, when it finds the partnership without assets and its judgment debt unsatisfied, from instituting suit against the individual partners to hold them liable for that debt.* To hold otherwise would insulate partners from their joint liability for a partnership debt.

Id. at 504 (emphasis added).

The court then rejected the defendant's due process argument. The court recognized, as a matter of due process, "the establishment of the personal liability of the general partners requires a legal proceeding in which (whether local practice requires him to be named personally or not) the individual partner thus pursued is personally served with process or notice." *Id.* (quoting *Detrio v. U.S.*, 264 F.2d 658, 661 (5th Cir. 1959)). Contrary to the defendant's argument, the court found that due process was not offended because the defendant's liability did not stem from the arbitration proceeding in which he was not a defendant, but by being properly served in the current proceeding. *See id.* at 505.

Relying on the rationale in *Dayco*, the court in *U.S. v. Sohn* reached a similar result. The issue before the court in *Sohn* was "whether, when a creditor seeks and obtains judgment against a partnership without naming the partners as individual defendants, the creditor may, after exhausting the partnership's assets, seek satisfaction of the remaining debt against the individual partners." *Sohn*, 971 F.Supp. at 489. The defendants were partners in a general

partnership. *See id.* at 488. A judgment was entered against the partnership in a prior litigation; however, the defendant partners were neither named nor summoned in the prior suit. *See id.* After exhausting partnership assets, the plaintiff commenced the current action against the partners' personal assets. *See id.* The court first noted that under the Uniform Partnership Act, "state and federal cases ... have uniformly allowed a second suit against the partners when the creditor follows proper procedures for serving the partners and obtaining judgment against them." *Id.* at 490. Following the court in *Dayco,* the *Sohn* court concluded that having properly served defendants in a separate action for the unsatisfied portion of the partnership debt, the plaintiff's suit was proper. *See id.* at 491.

The Second Circuit's conclusion in *14th RMA Partners* is in accord with those in *Dayco* and *Sohn. See 14th RMA Partners,* 100 F.3d 278. There the court held that a partner need not participate in the case against the partnership in order to be personally liable for the partnership's debt in a subsequent suit. *See id.* The Second Circuit reasoned:

> There is no rule exempting a plaintiff from the requirement of either naming the partner in the original suit against the partnership, or initiating a subsequent suit against the partner. If there is a subsequent suit, however, it is only for the purpose of affording the partner the opportunity to contest the limited issue of whether or not the defendant is in fact the general partner of the partnership. The validity of the judgment against the partnership cannot be relitigated. The general partner's liability is

> derived from having been properly served in the subsequent proceeding, and does not stem from his participation, if any, in the earlier action against the partnership itself.

Id. 280-81 (internal citations omitted). Accordingly, the court found that the complaint against the general partner in the subsequent suit provided adequate notice and opportunity to be heard to satisfy due process. *See id.* at 281.

Finally, in *Valley Nat'l Bank,* the Ninth Circuit clearly acknowledged the preclusive effect of a prior judgment against the partnership in a subsequent proceeding against the individual partners. *See Valley Nat'l Bank,* 121 F.3d 1332. There the plaintiff obtained a judgment against an Arizona partnership. *See id.* at 1334. Two of the partners in the Arizona partnership were Wyoming partnerships, which were neither named nor served in the underlying suit. *See id.* However, the Arizona partnership did participate in the litigation. *See id.* Since the Arizona partnership had no assets to satisfy the first judgment, the plaintiff filed a second suit against the Wyoming partnerships as partners in the Arizona partnership. *See id.* at 1335. The district court initially held that the first judgment was not binding on the Wyoming partnerships because they had neither been served nor named in the underlying suit. *See id.*

The court of appeals began by acknowledging that "because partners are jointly and severally liable, they may be sued in successive actions for the same claim." *Id.* at 1336. The court, quoting the Arizona statute, found that "in an action against a partnership, judgment is not authorized against unserved

partners." *Id.* "This comports with two general common law principles: (1) that a partnership is a party to an action does not itself make the partners parties; and (2) a judgment may not be entered against one not a party to an action." *Id.* (internal citations omitted). The court noted the latter principle was a matter of procedural due process in that due process requires personal service on a partner to bind his individual assets. *See id.* (citing *Detrio*, 264 F.2d at 660).

However, the court recognized the distinction between subsequently suing partners for the same claim and merely enforcing a prior judgment against partners who were not parties to the prior action. *See id; accord Benvenuto v. Taubman,* 690 F.Supp. 149, 153 (E.D.N.Y. 1988). While a judgment against a partnership could not be automatically extended to partners who were not a party to the prior suit and not named in the judgment, the court recognized the collateral effects of the prior judgment in a subsequent suit in which the partners were properly named and served. *See Valley Nat'l Bank* 121 F.3d at 1337; *Benvenuto* 690 F.Supp. at 153. The court relied on the Restatement (Second) of Judgments § 60, which states in pertinent part,

> (1) A judgment in an action by an injured person against a partner upon an obligation or liability incurred in the course of partnership business:
>
> * * *
>
> (b) if in favor of the injured person:

* * *

> (ii) renders the property of the partnership subject to execution to satisfy the judgment but is not otherwise binding on a partner who was not a party to the action unless he controlled or participated in controlling the defense of the action, or was given notice of an opportunity to defend the action.

Restatement (Second) of Judgments § 60 (1982). The court explained:

> What the drafters of the Restatement meant when they suggested that an unnamed, unserved partner who participates in a defense of the partnership may be "bound" by a judgment against the partnership is that *such a partner may be collaterally estopped from relitigating decided issues in a subsequent litigation,* not that the partner's participation in the defense of the partnership somehow converts a judgment against the partnership into a judgment against the partner.

Valley Nat'l Bank, 121 F.3d at 1337 (emphasis added). Thus, the court found that while due process prohibits converting a judgment against the partnership into a judgment against the partner, "the partner may be collaterally estopped from relitigating in a subsequent suit on the original debt issues actually litigated and necessarily decided in the suit against the partnership." *Id.* at 1337-38; *accord Benvenuto,* 690 F.Supp. at 153 ("[W]hile a partner's liability may be conclusively established by a prior adjudication as to the liability of his partner, the plaintiff in the first

lawsuit will not be able to execute judgment against an unnamed partner's *individual* property.").

As the foregoing cases illustrate, due process prevents a judgment from being executed against an individual's property when that individual did not have notice of the action or an opportunity to be heard. However, in the case of partners, due process does not necessarily prevent the factual findings as to the partnership's liability in an earlier litigation from having preclusive effect in a subsequent action against the partner individually. *See Valley Nat'l Bank,* 121 F.3d at 1337-38. The cases Defendants rely on are consistent with these principles. In all of those cases the courts were in agreement that a judgment against a partnership bound only the joint property of partners who were not a party to the action. This is because the absent partners' personal property could not be subject to a judgment entered only against the partnership consistent with the requirements of due process. There was no doubt, however, that the judgment against the partnership conclusively established the fact of the partnerships' liability and the amount. The only issue was whether that judgment provided access to the partners' personal property. The universal answer was no: a judgement against the partner individually was necessary to access his personal property. *See Detrio,* 264 F.2d 658; *Prado N. Residences, Ltd. v. Prado N. Condominium Ass'n, Inc.,* 477 So.2d 396 (Ala. 1985). Defendants' due process argument is incomplete, however, because their analysis stops at this point.

Unlike the cases Defendants rely on, *Dayco, Sohn, 14th RMA Partners,* and *Valley Nat'l Bank,* address the issue of whether, in seeking a subsequent judgment against a partner, due process would allow

the fact of the partnership's liability to be given preclusive effect. The courts that have addressed this issue have found that a partner could be estopped from relitigating the issue of partnership liability, despite not being served or participating in the prior action, consistent with due process. The basis for this finding is the notion that the partner's due process rights of notice and opportunity to be heard on the issue of the partnership's liability would be adequately protected by the partnership in the first litigation. *See Gilbert Switzer & Assoc. v. Nat'l Housing P'ship, Ltd.*, 641 F.Supp. 150, 155-56 (D. Conn. 1986); *Dayco*, 192 Conn. at 505; *Warner v. Lancia*, 46 Conn.App. 150, 163 (1997). However, further process, i.e. personally serving the partner as a defendant and giving him an opportunity to be heard on the issues of his partnership status and the requirements of issue preclusion, was necessary when attempting to levy against the partner's individual property. Where such further process was lacking, as in *Detrio* and *Prado*, the courts correctly prevented the plaintiffs from proceeding against the partners' personal assets.

Unlike *Detrio* and *Prado*, Defendants in the present case had notice of the New York litigation, whether or not they were partners. Plaintiffs served Defendants with a copy of the New York summons and complaint. Furthermore, Conrad Proctor, on behalf of David Proctor, was fully involved in the partnership proceedings and had knowledge of Macro's ongoing litigation. Finally, in contrast to *Detrio* and *Prado*, Defendants' assets are not being sought to satisfy the New York judgment. To the contrary, Plaintiffs are seeking a separate judgment against Defendants in a Court where they are subject to personal jurisdiction, after serving them with process individually.

The Court finds Defendants' argument that because the New York summons did not identify them as partners or individual defendants somehow excuses them from the consequences of not participating in the New York litigation without merit. Defendants, who were all admittedly partners in various partnerships at one time or another, must have known that if they were partners in Macro they would have unlimited liability for its obligations. Thus if they were partners, Defendants would have had every opportunity to be heard in that litigation and could have participated. They cannot now complain that their decision not to appear in New York deprives them of due process when they should have known the potential outcome of an adverse judgment against Macro. If Defendants were not partners in Macro, they now have the opportunity to raise that defense and escape liability. If Defendants are found to be partners in Macro, they have the opportunity to argue the issue of collateral estoppel and to show their interests were not adequately protected by Macro. If their interests were adequately protected, it is not unfair to preclude Defendants from rearguing Macro's liability when they could have done so in New York had they chose to appear. Therefore, as the courts in *Dayco, 14th RMA Partners*, and *Sohn*, the Court finds that Defendants would not be deprived of their right to due process by allowing Plaintiffs' suit to proceed.

Finally, Defendants' argument that due process requires that they be allowed to litigate their personal conduct is unpersuasive. A consequence of entering into a partnership is that one partner may be held personally liable for partnership obligations based solely on the conduct of another partner. This is the basis of joint and several liability. In the present case,

the New York court determined that the partnership breached the partnership agreement and its fiduciary duties to Plaintiffs. As a matter of partnership law, the partners in Macro can be held personally liable for this obligation regardless of their personal conduct. This is a risk of forming a general partnership. Therefore, Defendants' personal conduct, aside from its bearing on the issue of whether they were in fact partners, is irrelevant to the issue of the Macro's liability and, derivatively, the liability of its partners. Since Defendants have been properly served in this case and now have the opportunity to be heard on the issue of partnership, their right to have their personal conduct adjudicated will not be violated by precluding them from arguing the issue of partnership liability. A contrary finding would effectively render the concept of joint and several liability meaningless in partnership law.

The Court concludes that full faith and credit and due process do not require the Court to grant Defendants' Motion for Summary Judgment. Thus, Defendants' Motion for Summary Judgment is DENIED IN PART.

3. Anderson-Proctor Family Trust, Proctor, L.L.C., and Anderson-Proctor, L.L.C.

Finally, Defendants argue that Plaintiff cannot establish that the Anderson-Proctor Family Limited Partnership, Proctor L.L.C. and Anderson-Proctor L.L.C., were ever partners in Macro. The only evidence of record concerning these entities are letters written and signed by Conrad and Phyllis Proctor assigning income interests to or from these family entities. (*See* Docket # 39, Ex. K). Plaintiffs have not presented any

evidence regarding these entities that indicates they were ever partners in Macro. Furthermore, there is no evidence indicating that the other partners in Macro agreed, expressly or impliedly, to become partners with these entities.

Based on the fact that the assignments to and from these entities clearly indicates that any transfer was limited to the income derived from Macro, and the fact that Plaintiffs bear the burden of proof regarding partnership, the Court finds that there is no genuine issue of material fact that the Anderson-Proctor Family Limited Partnership, Proctor L.L.C., and Anderson-Proctor, L.L.C. were not partners in Macro. Accordingly, Defendants' motion is GRANTED IN PART as to Counts V, VI, and VII of Plaintiffs First Amended Complaint.

B. Plaintiffs' Motion for Summary Judgment

Plaintiffs' motion is based on the judgment from New York holding Macro liable to Plaintiffs. Because partners in a general partnership are jointly and severally liable for partnership debts, Plaintiffs contend that if any or all Defendants are found to be partners in Macro, they should be bound by the factual findings of the Macro's liability in the New York Court. Plaintiffs assert that there is no genuine issue of material fact that Conrad Proctor, Phyllis Proctor, and the Phyllis D. Proctor Trust, were partners in Macro and, therefore, are personally liable for Macro's unsatisfied debt to Plaintiffs. Defendants, with the exception of David Proctor, deny that they were ever partners in Macro.

Defendants state that Macro was initially located in California. Plaintiffs, on the other hand, have provided a partnership agreement signed by David Proctor indicating that Macro was formed under Michigan partnership law. It is undisputed that Macro relocated to Florida in 1991, and the partners agreed that the partnership be governed by Florida law. It is also undisputed that in 1995, the partners adopted Florida's Revised Uniform Partnership Act to govern Macro, retroactive to 1991. Neither party makes an effort to state which state's law is applicable to deciding whether Conrad and Phyllis Proctor, and The Phyllis D. Proctor Trust were partners in Macro. However, Plaintiffs and Defendants have based their arguments on both Florida and Michigan law. The Court finds that there is no substantive difference between Florida and Michigan law on the issue of partnership, and that general partnership principles can be applied for the purposes of resolving the current motion.

A partnership is uniformly recognized as an association of two or more persons, to carry on as co-owners of a business for profit. *See* UNIF. P'SHIP ACT 1997 § 202; UNIF. P'SHIP ACT OF 1914 § 6. Implicit in this definition, and an essential element of a partnership, is the necessity of an agreement. *See Rafael J. Roca, P.A. v. Lytal & Reiter, Clark, Roca, Fountain & Williams*, 856 So.2d 1 (Fla. Dist. Ct. App. 2003); *Bush v. Haire*, 197 Mich. 85 (1917). Such agreement can be express or implied from the conduct of the persons alleged to be partners. *See Byker v. Mannes*, 465 Mich. 637 (2002). In the absence of an express agreement, several factors are consistently used to determine the existence of a partnership. Foremost among these factors is whether the

purported partners share in the profits of the business. Sharing in the profits of a business either gives rise to a presumption of partnership or is prima facie evidence that a partnership exists. *See* MICH. COMP. LAWS § 449.7 (2002); FLA. STAT. ANN. § 620.8202 (West 2006). However, any presumption is not conclusive and other factors aiding in the analysis include: the intent of the parties, the investment of capital, the existence of partnership property, and the participation in management and control of the business. *See Dreyfuss v. Dreyfuss,* 701 So.2d 437, 439-40 (Fl. Dist. Ct. App. 1997); *Miller v. City Bank & Trust Co.,* 82 Mich.App. 120 (1978). The existence of a partnership is a question of fact. *See Perez v. Hernandez,* 323 So.2d 4 (Fl. Dist. Ct. App. 1975). Finally, the party claiming partnership has the burden of proving its existence. *See Klein v. Kirschbaum,* 240 Mich. 368 (1927). With these principles in mind, the Court will address Plaintiffs' Motion for Summary Judgment regarding Phyllis Proctor, the Phyllis D. Proctor Trust, and Conrad Proctor.

1. Phyllis Proctor

Plaintiffs contend that Phyllis Proctor became a partner in Macro when her son, David Proctor, in a letter dated January 2, 1991, instructed Macro to transfer his "interest in the Ohio-4 RSA Cellular Market" to Phyllis. Plaintiffs assert that because "interest" was not limited to an "income interest," the Court should construe the plain meaning of interest as transferring David's status as a partner. In further support of their motion, Plaintiffs provide evidence that following this transfer Phyllis acted as a general partner in Macro by signing resolutions identifying her as a partner, signing releases identifying her as a

partner, and giving Conrad Proctor a proxy to act on her behalf at a partnership meeting. Furthermore, Plaintiffs provided Phyllis Proctor's K-1 tax forms for the years 1991 through 1994 identifying her as a partner and correspondence from other partners in Macro referring to Phyllis as a partner. Finally, Plaintiffs claim that Phyllis admitted that she was a partner in Macro by stating that she was a partner in a 1992 mortgage application and in an affidavit submitted in the Florida litigation.

In defense of this motion, Defendants provide deposition testimony from Phyllis, David, and Conrad Proctor indicating that David's transfer in 1991 only transferred his income interest in the Ohio-4 market. Further, Phyllis clearly stated that she never intended to be a partner in Macro, never took part in any partnership business, any only signed partnership documents at her attorney's request. Moreover, Defendants argue that Macro's records were not accurate as to who they identified as partners. Finally, Defendants argue that based on the partnership statutes in Michigan and Florida, David Proctor could only have transferred an income interest to his mother. *See* MICH. COMP. LAWS §§ 449.24, 449.26-27. *See also* FLA. STAT. ANN. § 620.8503.

Based on the evidence submitted by both parties, the Court finds that there is a genuine issue of material fact concerning whether Phyllis Proctor was a partner in Macro. While Plaintiff argues that the purported transfer of partnership status was not limited to income only, the Court finds that a reasonable jury could infer that David Proctor only transferred the income from the Ohio-4 license. Since there is no dispute that Macro's business was not

strictly limited to the Ohio-4 license, a transfer of David's interest in this license would necessarily transfer less than his entire interest in Macro. Furthermore, the Proctor's deposition testimony rebuts Plaintiff's argument as to the intent of the transfer.

Plaintiffs also argue that Phyllis acted as a partner in Macro. The evidence on this issue is also conflicting. While Phyllis signed documents which identified her as a general partner, her testimony directly contradicts this inference. Further, there is no evidence of record indicating what effect, if any, the partnership gave these documents. Based on the Proctors' deposition testimony, these documents could have been unnecessary and merely submitted as precautionary measures on the advice of counsel. Plaintiffs also place great weight on the Proctors' mortgage application and Florida affidavits. However, Plaintiffs have not provided the mortgage application but only a letter from another partner in Macro related to the application, in which the partner informs the mortgage company of the Proctors' interest in Macro. Thus, this letter cannot be taken as the Proctors' admission. While there is evidence that supports Plaintiffs' argument that Phyllis Proctor was a partner, there is also evidence that supports the conclusion that she was not a partner. In light of Plaintiffs' burden of proof on the issue of partnership, the Court cannot say that Phyllis Proctor was a partner in Macro as a matter of law.

Additionally, Plaintiffs assert that judicial estoppel compels the Court to accept the Proctors' statement that they were partners in Macro from the Florida affidavits as a binding fact. The court disagrees. Judicial estoppel forbids a party from taking a position

inconsistent with one successfully asserted in an earlier proceeding. *See Pennycuff v. Fentress County Bd. of Educ.*, 404 F.3d 447, 452 (6th Cir. 2005). Federal standards govern judicial estoppel. *See id.* First, the position must be clearly inconsistent; second, the prior court must accept the position; and third, the party to be estopped must derive an unfair advantage from its position. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); *Pennycuff*, 404 F.3d at 452-53. Where the prior court did not accept or rely on the prior position, judicial estoppel is inappropriate. *See Pennycuff*, 404 F.3d at 453.

The Florida court decided the case based on lack of subject matter jurisdiction. That result was compelled by its finding that complete diversity did not exist because it concluded that Jack Sunseri was a California resident. Thus the Proctors' affidavits were not necessary to the court's conclusion, nor is there any evidence that they were even considered. Accordingly, judicial estoppel is inappropriate in this case.

Finally, Defendants argue that partnership by estoppel should apply to hold Phyllis Proctor liable as a partner. Again, the Court disagrees. Partnership by estoppel requires (1) that a person holds himself out to another as a partner in a partnership and (2) that the other detrimentally relies on this representation. *See McElwee v. Wharton*, 19 F.Supp.2d 766, 772 (W.D. Mich. 1998). Plaintiffs' claim as to Phyllis Proctor fails for several reasons. First, there is absolutely no record evidence that Phyllis held herself out to Jack Sunseri as a partner or permitted another person to do so. Second, Jack Sunseri admitted that he learned of David Proctor's transfer to Phyllis Proctor only after

filing this suit. (*See* Docket # 36, Ex. DD). Third, and more important, there is no evidence that Jack Sunseri detrimentally relied on any purported representation. Therefore, even if Phyllis Proctor had held herself out as a partner, Defendants' claim would still fail for lack of detrimental reliance.

The Court concludes that there is a genuine issue of material fact as to whether Phyllis Proctor was ever a partner in Macro. Based on the current record the Court cannot conclude that Phyllis Proctor was a partner as a matter of law and, therefore, Plaintiffs' Motion for Summary Judgment is DENIED as to Count II.

2. Phyllis D. Proctor Trust

Plaintiffs' claim that the Trust was a general partner is unconvincing. The only evidence of the Trust's involvement with Macro is a letter from Phyllis Proctor to Macro instructing that it transfer her interest in the Ohio-4 market to her trust. Plaintiffs argue that this automatically rendered the Trust a partner in Macro. However, as Defendants point out, there is no evidence that the Trust acted as a partner in anyway, was ever represented as a partner at partnership meetings, was ever identified as a partner in any partnership documents, and was ever admitted to the partnership by agreement of the partners.

Plaintiffs have the burden to prove that the Trust was a partner in Macro. *See Kirschbaum,* 240 Mich. 368. As stated, partnership status requires an agreement, express or implied. *See Bush v. Haire,* 197 Mich. 85. Additionally, sharing in the profits of a business is the most probative evidence of partnership.

See MICH. COMP. LAWS § 449.7; FLA. STAT. ANN. § 620.8202. In the case of the Trust, there is no evidence of agreement and no evidence that it shared in Macro's profits. Based on the record, there is no evidence from which a jury could infer that the Trust was ever a partner in Macro. Accordingly, the Court concludes as a matter of law that the Trust was not a partner in Macro. Therefore, Plaintiffs' Motion for Summary Judgment is DENIED as to Count IV, and, additionally, summary judgment is GRANTED in favor of Defendants.

3. Conrad Proctor

Plaintiffs argue that Conrad Proctor was the "straw that stirred the drink" in that he controlled the family's interest in Macro. To support their assertion, Plaintiffs have presented substantial evidence regarding Conrad's involvement with Macro. Conrad bought the investment to the family's attention, paid for David's share of the partnership and all future capital calls, participated in the partnership business as David's agent, drafted most, if not all correspondence between the family and the partnership, and was repeatedly referred to as a partner in Macro's documents. Finally, Plaintiffs argue that judicial estoppel and partnership by estoppel apply to Conrad Proctor.

Defendants have presented evidence to contest Plaintiffs' motion. Principally, Defendants' evidence indicates that Conrad Proctor was acting under a power of attorney while attending to partnership business. Defendants also point out that Macro's records and meeting minutes were often inaccurate as to how they identified persons, specifically failing to

indicate that persons in attendance may have been acting in a representative capacity. Furthermore, Conrad Proctor testified under oath in the New York litigation that he was not a partner in Macro and has also submitted an affidavit in this case stating the same.

The Court finds that the evidence presented by the parties thus far prevents it from concluding as a matter of law that Conrad Proctor was a partner in Macro. The evidence is contradictory and, because Plaintiffs are the movants, the Court must draw all reasonable inferences in favor of Defendants. *See Matsushita,* 475 U.S. at 587.

Plaintiffs' evidence does not permit a finding that Conrad Proctor was a partner as a matter of law. While Conrad was substantially involved with the partnership, a jury could infer that he was acting on behalf of his son, consistent with the power of attorney. The fact that Conrad may have been acting as David's agent while tending to partnership business weighs against a finding of partnership in this case. The maintenance of the distinction between principal and agent demands that a person not be found to be a partner based solely on participation in partnership business as an agent. To find otherwise would deter agency relationships in general. Furthermore, unlike Plaintiffs' claim against Phyllis Proctor, there is no evidence whatsoever that Conrad Proctor ever personally received income from Macro. Additionally, the Court finds that Macro's documents referring to Conrad Proctor as a partner are rebutted by his testimony in his deposition and the New York trial. Moreover, Plaintiffs' argument that judicial estoppel should apply to Conrad Proctor based on statements in

his Florida affidavit fails for the same reason it does concerning Phyllis Proctor.

Finally, Plaintiffs argue that partnership by estoppel applies to Conrad Proctor. Plaintiffs' only evidence directly relating to this argument is Jack Sunseri's affidavit stating that he thought Conrad Proctor was a partner, that Conrad Proctor told him he was a partner, and that he gave Conrad Proctor a proxy based on his belief. As with Phyllis Proctor, this argument fails as to Conrad Proctor. Conrad Proctor's affidavit directly contradicts Sunseri's by stating that he never told Jack Sunseri he was a partner. Furthermore, Defendants have presented evidence indicating that Jack Sunseri knew David Proctor was the actual partner in Macro before and after he gave Conrad Proctor the proxies. Specifically, Jack Sunseri nominated David Proctor for a position as a managing partner prior to granting the proxy and, in a letter postdating the proxy, referred to David Proctor as a partner. Thus, Jack Sunseri's reliance on any alleged representations by Conrad Proctor would have been unreasonable. Finally, even if he reasonably relied on Conrad's representations, Plaintiffs have provided no evidence suggesting Jack Sunseri's reliance caused him any detriment. Therefore, this argument must fail. Based on the current record the Court cannot conclude that Conrad Proctor was a partner as a matter of law and, therefore, Plaintiffs' Motion for Summary Judgment is DENIED as to Count I.

V. CONCLUSION

The Court finds that Defendants' argument based on full faith and credit, while technically correct, is not applicable to the present case. Therefore, Defendants

are not entitled to summary judgment as to Plaintiffs' entire case. However, Defendants have demonstrated that there is no genuine issue of material fact regarding the partnership status of the Anderson-Proctor Family Limited Partnership, the Phyllis D. Proctor Trust, Proctor, L.L.C., and Anderson-Proctor, L.L.C. Therefore, Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Finally, the Court concludes that Defendants have presented sufficient evidence to raise a genuine issue of material fact regarding whether Conrad Proctor and Phyllis Proctor were partners in Macro. Therefore, Plaintiffs' Motion for Summary Judgment is DENIED. Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgment be GRANTED as to Counts V, VI, and VII of Plaintiffs' First Amended Complaint and DENIED as to Counts I, II, and III of Plaintiff's First Amended Complaint.

IT IS FURTHER ORDERED that summary judgment in favor of Defendants is GRANTED as to Count IV of Plaintiffs' First Amended Complaint.

IT IS FURTHER ORDERED that Counts IV, V, VI, and VII of Plaintiffs' First Amended Complaint are HEREBY DISMISSED.

FINALLY, IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

s/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF

UNITED STATES DISTRICT JUDGE

Dated: November 3, 2006